

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~438~~ 8

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MARGARET M. MCGOWAN, ET AL., APPELLANTS,

vs.

MARYLAND.

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APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF MARYLAND

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FILED, SEPTEMBER 29, 1959

JURISDICTION NOTED APRIL 25, 1960

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[fol. 1]

**IN THE COURT OF APPEALS OF MARYLAND**

September Term, 1958

No. 237

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MARGARET M. MCGOWAN, et al., Appellants,

v.

STATE OF MARYLAND, Appellee.

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Seven Appeals in One Record From the Circuit Court  
for Anne Arundel County

(Benjamin Michaelson, Judge)

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[fol. 4]

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

STATE OF MARYLAND

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**DOCKET ENTRIES AND JUDGMENT**

Oct. 14, 1958—Warrant and copy of docket entries from Mag. DeAlbe fld. Charging on or about the 28th day of Sept. 1958, did violate the Sunday sales law.

Oct. 28, 1958—Prayer for Jury Trial on part of State's Atty. fld. Trial held, by agreement consolidated and tried with Nos. 4264-5-6-7-8-70, Pleads not guilty, elects court trial; Motion to Dismiss Warrant fld. (Judge Michaelson). Motion overruled, Finding guilty, Judgment and sentence of court (Judge Michaelson) that you pay a fine of \$5.00 and costs, and stand committed to the County Jail until fine and costs are paid, \$52.50 cash recognizance to be extended for payment of fine and costs.

Nov. 14, 1958—Order to enter appeal to Court of Appeals of Md. fld.

Nov. 19, 1958—Letter and suggestion for Removal fld.

Nov. 26, 1958—Letter and exhibits fld.

Dec. 4, 1958—Petition for extension of time to transmit record to Court of Appeals, and Order of Court thereto fld. (time of transmittal extended to and including 3rd Jan. 1959).

Dec. 30, 1958—Order of Court fld. (extending time for transmittal of Appeal to and including the 10th January 1959).

Jan. 2, 1959—Defendant's Proffer exhibits and Transcript of record fld.

[fol. 5]

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

SUGGESTION FOR REMOVAL—Filed November 9, 1958

Mr. Clerk:

The defendants suggest that they cannot have a fair and impartial trial in this honorable Court and request that said Court order and direct the record of proceedings in such suit to be transmitted to some other court having jurisdiction in such case for trial.

Margaret M. McGowan, Nina Lee Shiflett, Herbert Mayers, Eugene L. Hopper, Samuel Schepps, Betty R. Sawyer, Dora M. Joswiak.

(Affidavit)

EXHIBITS TO SUGGESTION FOR REMOVAL

*Maryland Gazette*—September 18, 1958

'2 Guys From Harrison' Open First New Maryland Store In Area Tomorrow.

One of the newer enterprises to hit this area will be "2 Guys from Harrison", whose big, modern store is slated to open on Ritchie Highway, at 6th Avenue Glen Burnie today (Thursday).

Ever since the public began to note the tremendous size of the building housing the store, it has been a source of wonder as to who or what would occupy it. Well, it's "2-Guys from Harrison".

The enterprise represents a chain of 16 stores throughout New Jersey, Pennsylvania and New York and they selected this present site as that for their first Maryland venture. [fol. 6].

### Varied Stock

The "2 Guys" will sell a large selection of apparel, toys, appliances, photography supplies, hardware, domestics and will feature the largest drug department in the entire area, with prescriptions accurately filled at reasonable prices. They advertise that all purchases may be made through the "2 Guys" easy credit plan.

The new store will bring employment to virtually hundreds of persons with a kick-off payroll in excess of \$400,000 a year. It is self-contained in a huge dome-like building that is an eye-catcher to passing motorists.

"2 Guys" are using a saturation-coverage of advertising to announce their opening this week, the Maryland Gazette being a part of that medium. We call our readers attention to their full-page advertisements found elsewhere in this issue.

*Maryland Gazette*—September 25, 1958

### Wade Announces:

#### County Police Will Enforce Law on Sunday Store Sales.

The Anne Arundel County Police Department will enforce the law which prohibits the sale of various articles of merchandise on Sunday, it was announced Tuesday in a formal statement issued by Chief Wilbur C. Wade, head of the department.

#### Chief Wade's statement follows:

"In the past we have received a number of complaints of the sale on Sunday of merchandise that is prohibited by law. We plan to rigidly enforce this law and feel that it is only fair to the merchants to forewarn them of this.

"The law permits the sale of only the following articles on Sunday: Tobacco, cigars, cigarettes, candy, sodas and soft drinks, ice, ice cream, ices and other confectionery, milk, bread, fruits, gasoline, oils and greases, drugs, medicines and patent medicines, newspapers and periodicals."

[fol. 7] The Maryland Code provides a fine of not less than \$20 nor more than \$50 for the first offense; not less than \$50 nor more than \$500, imprisonment for not less than 10 nor more than 30 days and revocation of license for the second offense. For a third offense a penalty of from 30 to 60 days is provided, along with a fine of not less than double that imposed in the last preceding conviction and loss of license.

*Evening Capital*—September 29, 1958

#### Police Accuse 20 of 'Blue Law' Violation Plainclothesmen Raid Eight Stores

Teams of police in plain clothes yesterday raided eight stores in northern Anne Arundel County and arrested 20 persons on charges of violating the law prohibiting the sale of certain articles on Sunday.

Those arrested included cashiers, clerks and store managers. All posted \$52.50 collateral and were released pending a hearing at 10 A.M. Thursday in magistrate's court at Ferndale.

The "blue law" squad, operating under the direction of Capt. George W. Wellham of the county police at Ferndale, began the raids at 1:30 P.M. and completed them within an hour.

Arrests were made at Two Guys from Harrison, Ritchie Highway, Glen Burnie; Eddie's Supermarkets at Harundale and Orchard Beach; two Sun Ray Drug Stores at Brooklyn Park; Sanitary Food Market, Brooklyn Park; Whitey's Supermarket, Linthicum, and Jerman's Food Market, Gambrills.

Operating in plain clothes were Lt. Max Muller; Sergeants Nathan C. Stinchcomb, John T. Erbe, Roy Volrath, Ashly Vick, Maxwell V. Frye, Jr., and James Moreland; Corporals Bernard E. Kiessling and Richard S. Disney and Pat. 1-c Joseph Bassford.

Police Chief Wilbur C. Wade had announced last week that his department had received many complaints about [fol. 8] "blue law" violations and said the ban against certain Sunday sales would be strictly enforced.

The state law provides that only such specified articles as tobacco products, confections, milk products, bread, gasoline, drugs, newspapers and magazines may be sold on Sunday.

Those Charged with violations were listed on official arrest slips as:

Jack Greenberg, 33 of the 5700 block Winner Ave., Baltimore.

Mrs. Gertrude A. Lashley, 25, of the first block Wendover Rd., Marley Park.

Herbert Mayers, 40, of the first block Salem Court, Pikesville.

Mrs. Nina L. Shiflett, 28, of Point Pleasant.

Eugene L. Hopper, 26, of the 400 block North St., S.E., Glen Burnie.

Samuel Scheps, 48, of the 4000 block Wabash Ave., Baltimore.

Mrs. Betty R. Sawyer, 31, of Millersville.

Miss Margaret M. McGowan, 26, of the 700 block Riverside Rd., Brooklyn Park.

Mrs. Dora M. Joswiak, 30, of the 300 block Furnace Branch Rd., N.W., Glen Burnie.

Miss Mary Popp, 18, of Tickneck Rd., Pasadena.

Martin E. Radtke, 46, of the 700 block Colorado Ave., Baltimore.

Charles E. Thomas, 21, of the 700 block Heath Ave., Linthicum.

Kenneth H. Roberts, 20, of the 100 block Nursery Rd., Linthicum.

Ben H. Rosenstein, 51, of the 2600 block Keyworth Ave., Baltimore.

[fol. 9] Deco O. Neal, 40, of the 500 block Forest Dr., Pasadena.

Bernard Billian, 28, of the 3600 block Bowers Ave., Baltimore.

Howard C. Simon, 20, a soldier at Fort Meade working at one of the drug stores.



Mrs. Nancy L. Duvall, 19, of Cedar Dr., Severn.

Joseph J. Waldsachs, 31, of the 1700 block Waverly Way, Baltimore.

Ramond M. Jerman, 56, of Gambrills.

*Maryland Gazette*—October 2, 1958.

### Police Arrest 20 For 'Blue Law' Violations At 8 Places.

Teams of police in plain clothes Sunday raided eight stores in northern Anne Arundel County and arrested 20 persons on charges of violating the law prohibiting the sale of certain articles on the Sabbath.

Those arrested included cashiers, clerks and store managers. All posted \$52.50 collateral and were released pending a hearing at 10 A.M. Thursday in magistrate's court at Ferndale.

The "blue law" squad, operating under the direction of Capt. George W. Wellham of the county police at Ferndale, began the raids at 1:30 P.M. and completed them within an hour.

Arrests were made at Two Guys from Harrison, Ritchie Highway, Glen Burnie; Eddie's Supermarkets at Harundale and Orchard Beach; two Sun Ray Drug Stores at Brooklyn Park; Sanitary Food Market, Brooklyn Park; Whitey's Supermarket, Linthicum, and Jerman's Food Market, Gambrills.

Operating in plain clothes were Lt. Max Muller, Sergeants Nathan C. Stinchcomb, John T. Erbe, Roy Volrath, Ashly Vick, Maxwell V. Frye, Jr. and James Moreland; [fol. 10] Corporals Bernard E. Kiessling and Richard S. Disney and Pat. 1-c Joseph Bassford.

Police Chief Wilbur C. Wade had announced last week that his department had received many complaints about "blue law" violations and said the ban against certain Sunday sales would be strictly enforced.

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- Mrs. Nina L. Shiflett, 28, of Point Pleasant.
- Eugene L. Hopper, 26, of the 400 block North St. S.E., Glen Burnie.
- Samuel Scheps, 48, of the 4000 block Wabash Ave., Baltimore.
- Mrs. Betty R. Sawyer, 31, of Millersville.
- Miss Margaret M. McGowan, 26, of the 700 block Riverside Rd., Brooklyn Park.
- Mrs. Dora M. Joswiak, 30, of the 300 block Furnace Branch Rd., N.W., Glen Burnie.
- Miss Mary Popp, 18, of Tickneck Rd., Pasadena.
- Martin E. Radtke, 46, of the 700 block Colorado Ave., Baltimore.
- Charles E. Thomas, 21, of the 700 block Heath Ave., Linthicum.
- [fol. 11] Kenneth H. Roberts, 20, of the 100 block Nursery Rd., Linthicum.
- Ben H. Rosenstein, 51, of the 2600 block Keyworth Ave., Baltimore.
- Deco O. Neal, 40, of the 500 block Forest Dr., Pasadena.
- Bernard Billian, 28, of the 3600 block Bowers Ave., Baltimore.
- Howard C. Simon, 20, a soldier at Fort Meade working at one of the drug stores.
- Mrs. Nancy L. Duvall, 19, of Cedar Dr., Severn.
- Joseph J. Waldsachs, 31, of the 1700 block Waverly Way, Baltimore.
- Ramond M. Jerman, 56, of Gambrills.

*Evening Capital*—October 6, 1958

### *Hearing Set:*

**Police Charge Seven More With Breaking Sunday Laws.**

Continuing their crackdown on Sunday "blue law" violations, county police yesterday arrested seven persons at a general store on Ritchie Highway, at Glen Burnie.



All of them were accused of violating the law which prohibits the sale of certain articles on Sunday. Each posted \$52.50 collateral for a hearing at 10 A.M. Thursday in Ferndale magistrate's court.

Police Chief Wilbur C. Wade said police checked stores in Glen Burnie, Brooklyn, Linthicum, Edgewater and other places and found that most of them were complying with the Sunday law.

In fact, he said, some of the stores had closed down altogether for the Sabbath.

Those arrested yesterday at the "Two Guys from Harrison" store were listed by police as:

[fol. 12] Mel H. Berlin, 44, of the 3900 block Penhurst Avenue, Baltimore, who was identified as manager of the clothing department.

Paul Kicey, 36, a Jersey City, N.J., man with a local address at a Glen Burnie motel, manager of the retail store.

Mrs. Vivian Irene Krazewski, 32, a clerk, of Pasadena, Maryland.

Mrs. Mary Jane Heppding, 20, a cashier, of the 400 block of Seventh Avenue, Glen Burnie.

Mrs. Doris Mary Wiley, 32, clerk-cashier, of the 400 block Fourth Street, Glen Burnie.

Mrs. Jenny Schaps, 50, of the 4000 block Wabash Avenue, Baltimore, identified as a housewife rather than a store employee.

Miss Isabel W. Male, 43, a cashier, of Fort Worth, Texas, with a local address at a Glen Burnie motel.

Participating in the crackdown yesterday were Sgt. Edward Praey and Cpls. Bernard Kessling and Richard Disney of the Ferndale station, and Sgts. Ashley Vick and James Moreland of the Edgewater station.

The store visited yesterday by the plainclothes squad was one of several raided the week before when the "blue law" crackdown began.

Twenty persons were arrested in the first raids. Five of them were fined \$20 and jury trials were scheduled for the others.

*Maryland Gazette*—October 9, 1958

### Sunday Arrests Made After Chamber Protest

Police action to enforce the Sunday "blue law" was precipitated after complaints were made of illegal sales, letters sent to the State's Attorney and governor and warnings issued, it was learned yesterday.

When the police crackdown started, it resulted in raids on two successive Sundays on stores in the northern section of Anne Arundel County and the arrest of 27 persons charged with violating the law which prohibits the sale of certain merchandise on the Sabbath.

The crackdown also has aroused sentiment in some quarters for action by the Legislature to repeal or revise the law, which many persons feel is antiquated.

State's Attorney C. Osborne Duvall said the first complaints followed advertisements indicating that some stores would operate on Sunday. These complaints, he said, came from attorneys representing Glen Burnie merchants.

Inquiries and complaints also were lodged with Chief of Police Wilbur C. Wade. He asked Duvall what to do and the state's attorney instructed him to observe the store of Two Guys from Harrison and others. This was done and warnings against Sunday violations were issued.

Subsequently, Duvall said, he received a letter from Paul Fleischmann, president of the Glen Burnie Chamber of Commerce, under date of Sept. 23, asking him to look into alleged violations of the "blue law."

Fleischmann said in his letter the merchants were unalterably opposed to Sunday commerce and urged the state's attorney to nip it in the bud.

With the letter was a copy of one Fleischmann had sent to Governor McKeldin, saying that Sunday openings were planned on a large scale. Fleischmann said it was an "odious" situation and asked the governor to do something about it.

The governor was attending the Southern Governors Conference in Lexington, Ky., at the time, but his office acknowledged receipt of the letter and replied it was a matter for the county authorities to handle.

Duvall said that as a result of the letter he received from Fleischmann he directed Chief Wade to see that the law was strictly enforced.

Wade made a public announcement that he would do so. The first crackdown was made Sunday, Sept. 28 and 20 [fol. 14] persons were arrested. Another was made last Sunday and seven persons arrested.

On Sept. 26, Duvall received a personal visit from C. Bowie Rose, Glen Burnie attorney, and Herbert Hubschman, president of Two Guys from Harrison, who were opening a large general store in the Glen Burnie area.

Also present were Assistant State's Attorney Clarence L. Johnson and Chief Wade.

Duvall said Rose and Hubschman expressed the opinion that the "blue law" probably was not constitutional. The state's attorney expressed no personal opinion on this, but said any citizen has the right to question the validity of any law.

He said Rose and Hubschman assured him the store was being located in the Glen Burnie area in good faith and that they had no intention of upsetting accepted practices in the community.

Duvall replied that the store could show its good faith by not opening on Sunday until the Legislature could be called upon to change the law, if the people wanted it changed.

However, the Two Guys from Harrison opened the following Sunday and was one of several at which arrests were made. It also opened last Sunday and again several persons were arrested.

Meanwhile, Schreiber Bros., Inc., has filed a suit against the Glen Burnie Shopping Plaza and Two Guys from Harrison, Inc., alleging the store had broken a lease arrangement by selling merchandise to which Schreiber's had been given exclusive rights.

A temporary restraining order has been issued in the case.

Duvall said that as he sees it, the remedy of the "blue law" situation lies with the Legislature.

It Would Appear, he said, that the public does not like the strict Sunday law. But, he added, his job is to enforce the law, not to legislate.

[fol. 15] Unfortunately, Duvall said, some of the merchants who have been hurt the most are small ones who have been serving their neighbors for years.

Practically all stores throughout the county were closed last Sunday, with the exception of those in Annapolis.

R. D. Pippen, executive secretary of the Glen Burnie Chamber of Commerce, said the organization was writing to Chief Wade to thank him for his cooperation in enforcing the law.

Some persons have contended that the law works a hardship by prohibiting the Sunday sale of such necessities as canned goods, baby bottles and pens, pencils and notebooks for children to use in their homework.

The law is so strict that it prohibits the giving away of certain merchandise.

All It Allows to be sold on Sunday are tobacco products, milk and milk products, bread, candy and confections, fruit, gasoline, oil, grease, soft drinks, drugs, medicines, newspapers and magazines.

A first offense is punishable by a fine of \$20 to \$50; a second offense by a fine of \$50 to \$500 and 10 to 30 days in Jail.

Second offenders also may have their trade licenses revoked for a year.

*Maryland Gazette*—October 9, 1958

### Chamber Praises Police For 'Blue Law' Activity

The Board of Directors of the Glen Burnie Chamber of Commerce voted Monday to (1) oppose further row-housing in the county and (2) commend Police Chief Wilbur Wade for enforcement of "Sunday blue laws."

Several members of the professional section of the Chamber—one attorney and two architects—opposed the row-house motion on the grounds that the action was "too broad."

[fol. 16] The move praising "blue law" enforcement was taken amidst rumblings that "there is more to this than meets the eye" heard after the meeting broke up. Many expressed concern to the *Gazette* that the laws themselves presently are "most inequitable and must be adjusted."

In other business, the directors heard immediate last president William L. McDowell urge members of an off-sprint "Glen Burnie Merchants' Association" to return to the official auspices of the Chamber, to take their "rightful place" in the leadership of the trade body.

After lengthy discussion—including a talk from merchant Nat L. Schein stating the group was "not against" the Chamber—President Paul Fleischmann named Norman DuBois to study the "problem" and report back to the Board.

And: the recent dinner meeting of the organization was revealed to have made "\$2.28 profit" and three new members—Stiffe Co., Acromat, Inc. and Pumphrey General Store—were admitted.

*Maryland Gazette*—October 9, 1958

### Police Charge Seven More With Breaking Sunday Laws.

Continuing their crackdown on Sunday "blue law" violations, county police Sunday arrested seven persons at a general store on Ritchie Highway, at Glen Burnie.

All of them were accused of violating the law which prohibits the sale of certain articles on Sunday. Each posted \$52.50 collateral for a hearing at 10 A.M. today, Thursday in Ferndale magistrate's court.

Meanwhile, five persons arrested the previous Sunday—at various stores—were fined \$20 each in Ferndale Police Court. Five other cases from the Sept. 28 arrests were held over for jury trials.

Police Chief Wilbur C. Wade said police checked stores in Glen Burnie, Brooklyn, Linthicum, Edgewater and other [fol. 17] places and found that most of them were complying with the Sunday law.

In fact, he said, some of the stores had closed down altogether for the Sabbath.

Those arrested Sunday at the "Two Guys from Harrison" store were listed by police as:

Mel H. Berlin, 44, of the 3900 block Penhurst avenue, Baltimore, who was identified as manager of the clothing department.

Paul Kicey, 36, a Jersey City, N.J., man with a local address at a Glen Burnie motel, manager of the retail store.

Mrs. Vivian Irene Krazewski, 32, a clerk, of Pasadena, Maryland.

Mrs. Mary Jane Heppding, 20, a cashier, of the 400 block of Seventh avenue, Glen Burnie.

Mrs. Doris Mary Wiley, 32, clerk-cashier, of the 400 block Fourth street, Glen Burnie.

Mrs. Jenny Scheps, 50, of the 4000 block Wabash avenue, Baltimore, identified as a housewife rather than a store employee.

Mrs. Isabel W. Male, 43, a cashier, of Fort Worth, Texas, with a local address at a Glen Burnie motel.

Participating in the Sunday crackdown were Sgt. Edward Praley and Cpls. Bernard Kessling and Richard Disney of the Ferndale station, and Sgts. Ashley Vick and James Moreland of the Edgewater station.

The store visited yesterday by the plainclothes squad was one of several raided the week before when the "blue law" crackdown began.

Twenty persons were arrested in the first raids. Five of them were fined \$20 and jury trials were scheduled for the others.

[fol-18] *Evening Capital*—October 13, 1958

#### Continue Check on Sunday Sale Law in County Police Arrest Two In North County

Continuing their check on Sunday "blue law" violations, Anne Arundel county police yesterday found most of the larger stores complying with the law, while practically all of the smaller stores were closed.

Only two arrests were made as the police visited 15 of the larger places in northern Anne Arundel and checked many of the smaller ones to see that prohibited merchandise was not being sold on Sunday.

Sgt. Edward A. Praley reported that he made two arrests at the store of 2 Guys from Harrison at Glen Burnie when he bought a pair of pants.



Charged with an illegal Sunday sale were John F. Conlee, 25, of Pasadena, manager of the men's clothing department, and Miss Alice Maye Weber, 1 of Glen Burnie, cashier.

Both posted \$2.50 collateral for a hearing in magistrate's court at Ferndale at 10.30 A. M. Thursday.

*Evening Capital*—October 14, 1958

### Ministerium To Get Proposal On Sunday Laws

The Rev. Curtis Crawford said today he will introduce a resolution at tomorrow's meeting of the Anne Arundel County Ministerium calling for a "strengthening" of laws prohibiting the Sunday sale of nonessential merchandise.

The measure, which calls for the support of the county's candidates for election to the State Legislature, would provide that the Sunday laws be "strengthened to prohibit all Sunday business transactions not indispensable to health and safety."

In addition, the Unitarian minister said he will ask the Ministerium to join him in condemning "policies of governmental compulsion of religious observance, such as the Naval Academy rule of compulsory church attendance for midshipmen."

[fol. 19] The complete text of the proposed resolution is as follows:

"Whereas, a weekly commercial recess is vital to the society's health, leisure and order;

"Whereas, such a recess cannot be achieved by individual voluntary decision;

"Whereas, the religious and leisure customs of a substantial majority make Sunday the most convenient day;

"Therefore, be it resolved that the Sunday laws of Anne Arundel County be strengthened to prohibit all Sunday business transactions not indispensable to health and safety;

"Be it further resolved that any Sunday law which compels or induces a religious or sectarian observance be repealed;

"Be it further resolved that local candidates for the State legislature be urged to support this position in the current campaign;

"Be it further resolved that policies of governmental compulsion of religious attendance for midshipmen are contrary to the spirit of this resolution, and are hereby condemned."

*Evening Capital*—October 20, 1958

### Police Arrest 8 On "Blue Law" Charges

County police arrested eight more persons on charges of Sunday "blue law" violations yesterday and State's Attorney C. Osborne Duvall said the first of some 30 pending cases would be tried next week.

The prosecutor said it was apparent that some merchants were determined to make a court test of the "blue law", which prohibits the Sunday sale of certain merchandise in Anne Arundel county.

Before yesterday's arrests, approximately 30 cases had been marked for jury trials. Duvall said he expected about half of them would come up for trial at the current term of Circuit Court here.

[fol. 20] Those arrested yesterday posted \$52.50 collateral each and were released for hearings before Magistrate Louis J. DeAlba at Ferndale at 10 A.M. Thursday.

The arrests, made at three stores in the Glen Burnie area, marked the fourth successive Sunday on which county police had cracked down on alleged "blue law" violations.

Cpl. Richard S. Disney and Patrolmen Richard Berger and George W. Bartlett reported the following arrests:

At 2 Guys from Harrison, Ritchie Highway, Glen Burnie:

Milton Fontz, 26 Elvaton Road, near Glen Burnie.

Mrs. Irma Anna Hostler, 18, 700 block Patapsco Ave., Baltimore.

Mrs. Margaret Thompson, 38, Brooklyn Park.

Mrs. Geraldine Rae Glinka, 33, 400 block M St., Glen Burnie.



At the Sanitary Grocery, 5000 block Ritchie Highway, Glen Burnie:

Mrs. Patricia Louise Salopek, 24, 500 block West Way, Glen Burnie.

Samuel Friedman, 41, who gave the store as his address.

At the Allen Drug Store, Harundale:

Allen Shenker, 29, 4700 block Garrison Blvd., Baltimore.

His father, Morris Shenker, 60, same address.

Police said the sales involved a pound of coffee, a can of spaghetti sauce, an electric extension cord, a ladies' blouse and a man's sport shirt.

*Evening Capital*—October 27, 1958

#### County Police Make Sunday Sales Arrests In Two Areas

Anne Arundel County police visited business places in both the northern and southern sections yesterday and [fol. 21] arrested 16 more persons on charges of violating the Sunday "blue law".

Police from the Ferndale station made 13 arrests at Glen Burnie, Gambrills, Harundale and Odenton, while officers from Edgewater made three other arrests at Deale and Mayo.

It was the fifth consecutive Sunday on which arrests had been made since police began cracking down on violations of the law which prohibits sale of certain merchandise on the Sabbath.

Those charged were:

• At 2 Guys from Harrison, Glen Burnie, James E. Verrick, 30, of Brooklyn, assistant manager; Del F. Roach, 25, of Pasadena, assistant manager; Mrs. Edna Mae Wooden, 23, of Brooklyn, sales clerk, and Mrs. Eleanor E. Carrek, 26, of Glen Burnie, sales clerk.

At Clauss's Food Market, Glen Burnie, Leonard W. Ensley, 30, sales clerk, and William O. Clauss, 53, owner of the store, both of Glen Burnie.

At Jerman's IGA Foodliner, Gambrills, Raymond M. Jerman, Jr., 19, of Gambrills, part-time clerk, and Mrs. Frieda Dehne, 27, of Gambrills, cashier.

At Carr's Betholine Station, Old Annapolis and Mountain roads, Walter T. Gray, 21, of Pasadena.

At Eddie's Super Market, Harundale, Thomas R. Wilson, 23, assistant manager, and Daniel S. Conrad, 18, clerk, both of Harundale.

At the Odenton Pharmacy, Miss Margaret B. Johnson, 32, clerk, and Harvey E. Basik, 32, druggist, both of Odenton.

At Captain Kidd's Grocery, Deale Raymond F. Selby, clerk.

At Dave's Corner, Mayo Richard L. Robinson, clerk, and Robert L. Brashears, owner.

[fol. 22] All of those charged posted \$52.50 collateral. Those arrested by Ferndale police will be given hearings Thursday. The others will have hearings at Edgewater on Nov. 3.

Policemen participating in the arrests were Patrolmen Richard Berger, George Bartlett, Edwin Prieber and James Werner, of Ferndale and Sgt. James W. Moreland and Patrolman Joseph O. Bassford of Edgewater.

The first of the "blue law" cases which have been referred to the Circuit Court are expected to come up for trial tomorrow.

*Morning Sun*—November 7, 1958

### Stand Voiced On "Blue Law"

#### Arundel Group Asks Strict Enforcement Or None

Annapolis, Nov. 6 (AP)—Anne Arundel county commissioners have proposed that the State's Sunday "blue law" be enforced "100 per cent in all areas of the county" or not at all.

The request for total enforcement was not intended as an indorsement of the law but as an indication that the law is inequitable and is not being enforced uniformly.

Marvin L. Anderson, board counsel, today began preparing a resolution expressing the commissioners' position. It will be sent to the State's attorney, C. Osborne Duvall, and Police Chief Wilbur C. Wade.

The resolution was ordered yesterday after a public hearing on the controversial law which bans the sale of certain items on Sunday.

### "No-Authority"

Several board members expressed the view that 100 per cent enforcement would be impossible. But they said the law should not be enforced at all unless it can be applied to all violators.

[fol. 23] "If the State's attorney can't enforce it 100 per cent," said the board president, Ralph L. Lowman, "he has no authority to persecute me over you or you over me."

About 40 persons appeared at the hearing to protest the recent crackdown on restricted sales.

Solomon Liss, a member of the Baltimore City Council who appeared as attorney for several county merchants, urged the commissioners to ask Governor McKeldin to call a special session of the Legislature to modify the law.

### "Equal Treatment" Asked

Liss said some small business men may be forced out of business unless the law is modified before the Legislature meets again in January.

Harry Silbert, attorney, appeared for owners of a Glen Burnie variety store and urged that his clients be given "equal treatment under the law."

He said employees of the firm were convicted of illegal Sunday sales "while the very same merchandise is being sold all over Anne Arundel county every Sunday."

Some 30 persons have been arrested on recent Sundays, most of them in the Glen Burnie area. Some of those fined are expected to appeal their convictions to test the law's constitutionality.

Bernard S. Melnicove, attorney for the Maryland Pharmaceutical Association urged modification of the law as it pertains to drug stores.

## IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

MOTION OF DEFENDANT TO DISMISS WARRANT—Filed  
October 28, 1958

The Defendant by the undersigned counsel respectfully moves the Court to dismiss the warrant in this case upon the following grounds and for the following reasons:

[Col. 24] 1. The Defendant has not been indicted pursuant to the express requirements of Article 27, Section 521 of the Code.

2. The statutes under which the Defendant is charged violate the Equal Protection and Due Process Clauses of the Federal and State Constitutions.

3. The statutes under which the Defendant is charged are arbitrary, capricious, and unconstitutional upon their faces in that there is no reasonable basis for the distinctions made therein, between what is and what is not permissive in the way of work and sales on Sunday.

4. The statutes under which the Defendant is charged on their faces arbitrarily discriminate against the activity in which the Defendant is engaged.

5. The statutes under which the Defendant is charged are vague, ambiguous, contradictory, and do not give reasonable notice of the conduct sought to be established as criminal.

6. The statutes under which the Defendant is charged violate the guarantee of freedom of religion and separation of church and state provided for in the Federal and State constitutions and discriminate against persons who observe other sabbath days than Sunday.

7. This proceeding constitutes part of a pattern of discriminatory enforcement of the statutes under which the Defendant is charged by reason among others of the fact that the said statutes have not been enforced for a long period of time and this Defendant and certain others in similar circumstances have been discriminatorily selected for enforcement by reason of the pressures generated by

certain business competitors who have attempted to employ the said statutes as a means of oppression and elimination of business competition.

8. And for other reasons shown at the hearing hereof.

Cornelius P. Mundy, Herbert H. Hubbard, Melvin J. Sykes, Attorneys for Defendant.

[fol. 25]

**Testimony in Open Court Before  
Hon. Benjamin Michaelson**

October 28, 1958

Present:

HON. BENJAMIN MICHAELSON

**APPEARANCES**

Mr. C. Osborne Duvall, State's Attorney.

Mr. Clarence L. Johnson, Asst. State's Attorney.

Mr. Cornelius P. Mundy, Mr. Herbert H. Hubbard, and Mr. Melvin J. Sykes, Solicitors for Defendants.

**COLLOQUY BETWEEN COURT AND COUNSEL AND RULINGS OF  
COURT ON MOTIONS FOR POSTPONEMENT, ETC.**

Mr. Mundy: For the record, may I say, we were all employed in the case for the first time yesterday. I was first approached by the corporation, I suppose it is, that employs these defendants, around 12:30, my colleagues came into the conference sometime later in the afternoon. We feel that there are some very serious constitutional questions involved, which we have not been able to do justice to during the short time of our employment. We should like additional time to be able to show that the statutes upon which these prosecutions are predicated are invalid on their face, are contrary to the provisions of the state and federal constitutions. We should also like to show that these statutes have been discriminatorily enforced, and I say that not meaning any criticism upon the enforcement officers of this state; according to our understanding there is little or no enforcement, and I'm subject to correc-

tion on this statement, until about five weeks ago there was none. Beyond that the statutes have not, again, according to our understanding, been enforced uniformly, as against all merchants whose activities are proscribed by the statutes. In order to present that phase of the constitutional question we should, of course, have to call witnesses to show the pattern of the enforcement. We are not in a position to call such witnesses this morning. Now, if the Court wishes I shall make all my motions at this time so that you'll have them all before you.

Court: Proceed.

[fol. 26] Mr. Mundy: We move that the prosecution be dismissed, one reason for that motion is, that the trial today when it's held will be upon warrants, no indictment, no information has been returned. We submit to Your Honor that under Section 521 of Article 27 the statute which prohibits merchandising on Sunday indicates that this should be either an information or an indictment filed. We assert to Your Honor that the section of the statute, if enforced in these cases, would constitute a denial of due process and of the equal protection of the laws in contravention of both federal and state constitutions. We move that the sections violate the due process, and equal protection clauses, because they are arbitrary and capricious, because there is no reasonable basis for the various distinctions made because of discrimination against the defendant's businesses, because the statutes are vague and do not give reasonable notice of the conduct defined as criminal. One of the sections, Section 509, with which I'm sure Your Honor is much more familiar than I, constitutes an exception to the Sunday laws as to Anne Arundel County, that exception has to do with bathing beaches, bath houses, amusement parks, and other places. There is also an exception in that section that removes from the legality, the sale or selling at retail of any merchandise essential to or customarily sold or incidental to the operation of the aforesaid occupations or business, Picnic groves, amusement games, amusement devices. I call Your Honor's attention to the phrase essential to or customarily sold or incidental to the operation of the aforesaid occupations. Had we the time to present this case adequately, we should



have investigated, visit, the various amusement parks, beaches, to show what is essential to or customarily sold at those places, and we would then endeavor to show that the sales made by our clients come within that exception. Owing to the short time that we have had to prepare for trial, we find that we are unable to produce that testimony this morning. Again, with great respect for this Honorable Court, we should like to move for a removal of the cases from this Circuit, because according to our information there has recently, especially, been considerable agitation [fol. 27] concerning these so-called Sunday Laws in this county. We have not, at the moment, in readiness the necessary affidavits of removal. We are aware, of course, that in this type of case removal is discretionary with Your Honor. We should like to be given the privilege of filing those motions within some reasonable time, and I refer, specifically, to all the motions that I've made this morning which might be required to be in writing, and that Your Honor will pass upon these motions now, although, made orally as if the motions were before this Honorable Court in writing. As one of my colleagues points out to me, apropos of the removal point, we should like to file certain documentary evidence including newspaper clippings from this county to show that in our humble opinion, there could not be a fair trial in this jurisdiction. Now, there is a statute, I don't know the reference to it off-hand, that requires a prosecution for this type of violation to be instituted within thirty days from the date of the violation, that's possibly a plea of limitation or possibility it should be raised by motion for dismissal. We move, additionally, that the prosecutions be dismissed because of the belatedness. Now, may I before closing, make another constitutional point that we should like with adequate time to make, is that the Sunday Laws violate the First Amendment to the Constitution of United States, which under corresponding provisions of Maryland Constitution, which, of course, guarantees separation of State from religion. Now, may it please Your Honor, I should like at this time to thank the Court for hearing these motions, and as one who is greatly influenced by courtesy and graciousness, I should

like to say publicly that I communicated with Mr. Duvall yesterday to get information concerning these cases, and he dropped all the work that he was doing and went out of his way to give me the necessary help, and I'm sure that he'll go out of his way this morning to have us convicted if possible, and I respect him for that. Thank you.

Court: Does the State wish to say anything?

Mr. Duvall: May it please the Court, the State feels that all of the motions made on behalf of all these defendants should be overruled at this point. Directing myself first to the basis of the motion for the removal of these cases, the State would point it out, that the newspaper accounts to which my brother referred, were a merely a recitation of the police activity in these various establishments which gave rise to the arrest that were made, which are before the Court today. There was nothing in the newspaper accounts that was in any way inflammatory or prejudicial to the rights of these accused to have a fair and impartial trial before a jury that appears in this county. We feel there cannot be any showing of facts in support of this motion which would indicate to the Court that its discretion should be invoked to the point of removing these cases from the Circuit.

With respect to the motion as to plea of limitation, on the face of the warrants, which is all that the Court has before it at this time, you will find that the warrants were obtained prior to the expiration of thirty days from the date of the offense named in the warrant, and it's the State's understanding that the obtention of a warrant or the filing of an indictment or information stops the running of limitation, for that reason, we feel that motion is not valid. The basis of the motion for dismissal of the warrants that my brother raised regarding the failure of this prosecution to be predicated on an indictment or information, the State points out that this type of case which may be tried before a Trial Magistrate can properly be tried on a warrant. The Court may recall this very point was raised in some book making cases before this Court some three or four years ago, in which the defendants were brought to trial on warrants, similar to what we have in this instance, and the defense counsel raised that point,



that the language of the statute says, that a person in effect, and I'm speaking from memory, shall be tried on indictment or information.

Court: You're talking about the Rizzo case?

Mr. Duvall: The Rizzo and the companion case, Salsburg. We feel that proposition is authority for the Court to deny the motion to dismiss on that ground.

[fol. 29] With respect to the suggestion that my brother made, that the statute involved, Section 521, violates the First Amendment of the Constitution of the United States, and its corresponding provision of the Maryland constitution, the State directs the Court's attention to two cases which have gone to the Court of Appeals of this State; one is the Levering case, I think, 134 Md., 48; and the Judefind case in 78 Md. Those two cases, may it please the Court, were cases in which the constitutionality of the section pertaining to labor on Sunday, which is now—

Court: Section 492, I think the section is.

Mr. Duvall: Yes sir, section 492 of the recent code. In that case the Court of Appeals said in effect, as I recall the opinion, and I frankly, do not have it abstracted, that it is within the province of the legislature to pass laws which are civil in nature and require a day of rest from one's labor. And that question of the breach of religious freedom, as provided under the First Amendment, was specifically raised and disposed of. The Court of Appeals in both of those cases said that these laws were not religious, but were civil, and that, reflecting the attitudes and views of the public at large, that the legislature could pass such a statute and it did not contravene those sections of the constitution, to which reference has been made. My brother further stated, as a basis for this motion to dismiss, that the statute in question was a denial of due process and equal protection of law. There are a number of cases, I cannot cite them by chapter and verse at this point, but there are a number of them, I will work them and submit a memorandum if the Court desires, which hold, that the State may classify types of merchandise sold, types of work to be performed, and that it is a valid regulation under the police power of the State. And those cases where these laws have been attacked on those two grounds,

namely, the denial of due process and the protection of the laws, the Courts have, in my limited reading of the matter, a uniformity held as in the power of the legislature to set up those distinctions. Now, it might be pointed out at this time that we are dealing not with a statute particularly applicable to Anne Arundel County, but a statute which has state wide application except in so far as it may be modified in political sub-divisions that have home-rule, and Baltimore City has an ordinance which it has modified it to some extent, and I believe, Baltimore County under its charter provisions has home-rule, and the county council there has passed an ordinance to modify it, but it has state-wide application, there did not appear to me on the face of the statute to be any prohibition or exception which denies the people of this state the equal protection of the law or of due process. I believe, I have endeavored to answer the—Mr. Johnson has pointed out that Mr. Mundy made a statement regarding Section 509. The State's position there is simply this, that Section 509 is an act passed by the legislature which exempts certain activity in Anne Arundel County from the effect of Section 492 and Section 591. There again, as in the Salsburg case, the Court of Appeals has held that the legislature may except a county from the force and effect of a state law, and so long as it has county wide application it does not contravene the provisions of the Constitution relating to the protection of the laws, and Court may recall in the Salsburg case, the statute involved was on which exempted Anne Arundel County and two other counties from the effect of the Bouse Act in so far as operations were concerned. For those reasons, may it please the Court, the State respectfully request that the motion that was made by my brother be overruled.

Mr. Sykes: If Your Honor please, Mr. Hubbard would like to say something, specifically, on point limitations and the necessity for indictment, and then I would like to argue to the Court more specifically as best I can now, the nature of these constitutional points because I'm afraid they've been misconceived by the State's Attorney, and I wanted the basis of them in the record as clearly as I can get them at this time. With Your Honor's indulgence.

Mr. Hubbard.

Mr. Hubbard: May it please the Court, if Your Honor please, I was not familiar with the fact that there had been [fol. 31] a ruling in this Court, I believe, the State's Attorney stated, on the requirement for indictment under Section 521. If there has been such a ruling—

Court: Not under Section 521; but the question has been raised previously as to whether or not it's necessary to have a person tried on information or indictment for a misdemeanor when it happened in a case of a violation of a lottery or gambling act.

Mr. Hubbard: Oh, well, then this is a new point, we did not mean to raise it in that contest. Section 521, the statute under which these defendants are charged reads as follows: no person in this state shall sell, dispose of, barter or deal in, or give away any articles of merchandise on Sunday, except retailers who may sell and deliver on said day tobacco, cigars, cigarettes, candies, sodas and soft drinks, ice, ice cream, ices and other confectionery, milk, bread, fruits, gasoline, oils, and greases; and any person violating any one of the provisions of this section shall be liable to indictment in any Court in this State having criminal jurisdiction, and upon conviction thereof shall be fined etc. Our contention, may it please the Court, that this statute, specifically, for reasons best known for the legislature at the time it was enacted prescribes that these cases must be brought into this Court upon indictment by the Grand Jury, and may not be brought in upon warrants or in any other form, of course, unless there is a voluntary waiver of indictment by the defendants. There has been no such waiver and the defendants assert that they are entitled to be indicted, and the case to be presented to the Grand Jury. Now, in line with that argument there is also a section, the number I don't remember for the moment, which states that prosecution under the Sabbath breaking laws must be brought within thirty days or one month. It is our argument in this case that (one) prosecutions must be brought by indictment, (two) there have been no indictments within the thirty day period, therefore, in those cases where the offense or alleged offense occurred thirty days prior they're barred by limitations. The last point that I'd like to make before Mr. Sykes is

[fol. 32] heard is the fact that when reading Section 509 together with Section 521 and all of the other sections, particularly, those two sections, the statute setting forth a criminal act is so vague and ambiguous as to deny due process to the defendants. It goes without saying, and there's probably little argument about the fact that in order to be subject to criminal sanctions, a law must be so drawn so as to apprise the public just what constitutes the crime.

Court: Well, now, those are all general comments, point out specifically what you have in mind.

Mr. Hubbard: In this case, Section 509, as Mr. Mundy has already commented, states that articles of merchandise which are customarily sold at bathing beaches, dancing saloons, and certain other places may be sold on Sunday.

Court: Wouldn't that argument relate more to prosecution under that section, as the same as prosecution under 521 if we were dealing with cases which were suggested to be violations of Section 509 of Article 27, that argument would have some effect.

Mr. Hubbard: Section 509, sir, it is our contention, does not of itself establish any violation, it merely creates exception under 521, and, I believe, under 492, it expressly says so. It says, that these sections are—I'll read the language of it, "It shall be lawful to operate, work at, or be employed in the occupations of operating any bathing beach,—

Court: Court is familiar with that, you don't have to read it, I read it so many times I can almost—

Mr. Hubbard: All right, sir, and Sections 492, 521, that's our sections, and 522 of this Article are repealed in so far and to the extent that they prohibit the operating of, and/or working law for employment of persons in the operation of any bathing beach, etc., or the sale or selling at retail of any merchandise essential to or customarily sold at, or incidental to, the operation thereof. It is our contention that reading Section 509 together with Section 521, as any lawyer would have to do in advising his client what [fol. 33] he may or may not sell, that it is, virtually, impossible for one to advise his client just what constitutes a crime, because how can one tell merely from reading a statute, and what is common knowledge, just what is cus-

tomarily sold at a dancing saloon or a bathing beach or any of these other places listed in this statute.

Court: That's why the Court made the comment it did. If you were dealing with a case in which Court had to determine whether or not violation of the law as a result of that section, then there may be some applicability of your argument, but the charge is here, as the Court understands, are not violations of Section 492 or Section 509, but Section 521.

Mr. Hubbard: Well, we plan to offer evidence, may it please the Court, if we have time, to show that these people in many instances were actually eliminating certain items from sale.

Court: If you could wave a magic wand and make all these places where these alleged violations of the law occurred bathing beaches, amusement parks, why, you wouldn't have much difficulty, would you?

Mr. Hubbard: No sir, but we feel that that would probably be a matter of evidence, if we have time to present it and are able to obtain our witnesses to show that there was an attempt to sell only items which were customarily sold at these places in many instances, and to come within the exemption of Section 509, thank you.

Mr. Sykes: May, it please the Court, in making this constitutional argument, I don't mean to waive our motion for postponement or other points, I'm just doing the best I can under the conditions we have, but I think it's instructive in this case to give Your Honor the general background of these statutes, specific statutes I'm going to raise. In the beginning we had one Sabbath breaking law, that was Section 492, that prohibited doing work or bodily labor on Sunday except for works of necessity and charity. The Court of Appeals in another day, in the [fol. 34] Levering case, as the State's Attorney has indicated, sustained that, sustained it on the theory that the State has an interest in making sure that its citizens rest at least one day a week; that reasoning is entirely inapplicable to the laws that exist today.

Court: Well, now, you better be careful and choose your words consistent with what you mean, if you're talking now civilly now, that's one thing, if you're talking now from the religious side of it you may have—

Mr. Sykes: I'm talking from the point of view, the way these laws have finally shaped up they don't secure any interest in having anybody rest on one day a week because what happened after the Section 492 was construed and upheld by the Court of Appeals was this, as Your Honor knows, there was a succession of approaches to the legislature on behalf of specific business interest and localities, and exception after exception was carved out of this general statute. You have certain sport exhibitions allowed, you have motion pictures allowed—

Court: Skating rink, bowling alley, and all the others, football, baseball.

Mr. Sykes: Right, then you have general alcoholic beverage law, which permits the sale of beer on Sunday, which is a much more degrading thing than the sale of a cement trowel to putt around in your private garden on Sunday. Now, in addition to that, there is a special law in Anne Arundel County which applies to motion picture theatres, and there is Section 509, which I'll comment on in a minute, finally, there was a Section 521 under which the indictments are laid here, I mean, under which the warrants are laid here, in which there are several exceptions, even to the sales provision. Now, the sales provision prohibits sale in terms, but then it allows retailers to sell tobacco, cigars, cigarettes and candy and soft drinks, ice cream, milk, bread, fruit, gasoline, oils and greases, it's all right to have people travel up and down on Sunday and not stay home and work, it also doesn't apply to apothecaries, and it doesn't apply to newspapers and periodicals. [fol. 35] In addition to that, finally, the bathing beaches and amusement parks sought an exemption for themselves, but they went further than that, Your Honor, and I'm not sure that Your Honor has completely understood the gist of our argument on this point, Section 521 on its face prohibits the sale of certain articles, we say, that on its face it is a discrimination in favor of what it permits to be sold, and a discrimination against what it refuses.

Court: Isn't this the same argument that applies so frequently to local option and the sale of intoxicating beverages and different license fees that prevail in different various sections of this county?



Mr. Sykes: No sir.

Court: Some sections tax cigarettes and others don't tax cigarettes and so forth and so on.

Mr. Sykes: No sir, 521 is a state wide statute on its face, and 521 as modified by 509 applies in Anne Arundel County and applies uniformly, geographically in Anne Arundel County.

Court: That wasn't done by Anne Arundel County, that was done by the state's general assembly.

Mr. Sykes: I know, but we have to ask ourselves—

Court: It's not like, for instance, you attempt to have baseball in Baltimore some years ago and the City Council passed an ordinance and allowed the playing of baseball and then it was found invalid. You have to figure the source from which this legislation comes.

Mr. Sykes: What I'm saying is this, Your Honor, this legislation comes while, it comes from the legislation it applies to Anne Arundel County, but you have to take the legislation as a whole, and you have to try to square it with the constitutional requirements for legislation. If the legislature, for example, had passed a law saying that every person in Anne Arundel County who has red hair is liable to immediate imprisonment for ten days, obviously, that kind of law can't stand because it's an arbitrary and [fo]. 36] capricious law on its face, it's not a reasonable classification. Now, look at what they have done here, and this is the important thing about this, Section 521 prohibits certain sales, Section 509 says, as far as Anne Arundel County is concerned the prohibition of these sales made by 521 has to be modified, and Section 492, 521 and 522 of this Article are repealed, in so far as—

Court: Now, in so far as what?

Mr. Sykes: In so far as they prohibit operating bathing beaches, that's not our case.

Court: What's the next thing?

Mr. Sykes: In so far as, they prohibit amusement parks and dancing saloons, that's not our case. I can pass over the question of whether it's an arbitrary discrimination to permit a dancing saloon and not to permit us to sell a cement trowel.

Court: Put a peg right there for a minute—in so far as

the niceties of these various situations are concerned, if you approach this from the violation of the Sunday law, what is there that strikes you more forceably than the fact that the Court of Appeals has said, that the sale of whiskey and beer on Sunday is valid, where would you get a more specific declaration as to what may be permitted on Sunday.

Mr. Sykes: What the Court of Appeals was saying was—

Court: Article 2B superseded.

Mr. Sykes: Yes, the sale of whiskey and beer was valid, but we now have the question, if the statute authorizes the sale of beer and whiskey, can it forbid the sale of a cement trowel on a reasonable basis?

Court: What you're trying to say to the Court is, is that the equity of the situation ought to be that if you can sell whiskey and beer on Sunday, why can't you sell some of these less harmful or less destructive, less demoralizing [fol. 37] items or articles, but this Court doesn't make the law, this Court doesn't legislate.

Mr. Sykes: But the Court enforces the prosecution, if Your Honor pleases, that the laws be reasonable and not arbitrary.

Court: Yes, but when we have a law that is, as far as we can determine, that presuntably is a valid law, until it's declared to be otherwise, and that's this Court's function.

Mr. Sykes: Your Honor is the Court and the question is before you.

Court: But the Court cannot determine what laws shall be enforced and what laws shall not be enforced, that's not the Court's province.

Mr. Sykes: Your Honor, may I say on that point, just this and then I will leave. This Court has no power, as Your Honor has said, to decide whether a statute passed within constitutional limits is wise or not, but becomes a point when a statute, as Your Honor mentioned in a discussion in the chambers, on its face makes distinctions which are ridiculous, and when that occurs the statute is arbitrary and passes the constitutional limits and the Court must strike it down because it sustains statutes passed and the exercise of the police power only when they



are not arbitrary and unreasonable, I can't say any more than that.

Court: Court didn't use the word arbitrary.

Mr. Sykes: Court used the word ridiculous.

Court: Ridiculous, that's right, and it commented on it right now. The Court's personal opinion sometimes is not what the law says it ought to be, Court's personal views sometimes are entirely different in what it has to decide, but that's no concern of ours, with what the Court's personal opinion is, it's what the law is, that's the thing we're concerned with, what is the law.

[fol. 38] Mr. Sykes: Well, the next point on this 509 which I wanted to make, Your Honor, was the continued reading, the respects in which Section 521 were repealed by this statute. The third respect is, that it's repealed in the case of the sale or selling at retail of any merchandise essential to or customarily sold or incidental to the operation of the aforementioned occupations. Now, that does not mean that the merchandise has to be sold at a bathing beach, it doesn't say that, it says, that the merchandise has to be of the kind of merchandise that is customarily sold at a bathing beach. Now, Your Honor may know about bathing beaches and about the fact that you can buy almost anything under the sun at some of these large amusement parks in Anne Arundel County. A person who is faced with the problem of what, if anything, he should sell on Sunday has Section 509 and Section 521 before him as if they're written as part of a single section. Section 521 says you can't sell on Sunday and names certain exceptions; and then there is a further exception repealing 521, which applies to articles customarily sold in all these various institutions, including dancing saloons and the Lord knows what. Now, the question is then, what does 521, as amended, repealed by 509 really prohibit, does anybody know sufficiently, with sufficient definiteness when he sells an article on Sunday that he is violating the sections of 521, when the statute itself has used almost impossibly vague standards, saying that oh, no, you don't violate this if you sell what's customarily sold at all of these things. What is the retailer suppose to do, go take the census of what's sold at all these things? Your Honor could take judicial notice that

there is a tremendous amount of material that's sold at these various institutions, and I say to you that the statute 509 has provided an exception as repealed, 521, to such a great and broad extent that when you construe the statute in its entirety it does not meet the requirements of reasonableness, certainty and definiteness that a criminal statute must meet, and therefore it is violative of the due process caused.

Court: The Court can say in response to it is simply this; if in these cases any sales were made as provided in [fol. 39] Section 509 that exception would apply, but as the Court understands it: these are not prosecutions under Section 509, but under Section 521, it doesn't say anything about a number of things that could be said. Now, you asked the Court the question how can you tell from Section 521 what ought to be sold, it says what can be sold, the Court didn't put those words into that act, the General Assembly in the State of Maryland set that up as Section 521 of Article 27, passed by the majority of the legislators of this state, whether wisely or unwisely, that's not for the Court to say. Counsel well knows that wisdom of legislature is not the Court's business, that's the business of the representatives of the people in the General Assembly.

Mr. Sykes: I hesitate to repeat myself, but as this case will undoubtedly wind its way up the judicial path, I want to make it perfectly clear in the record what my position on this is, so that there can be no misunderstanding. I am under the apprehension that Your Honor does not comprehend the test of our argument under 509, and for this reason and his reasons from the bench that 509 has nothing to do with this case because this is not a prosecution under 509.

Court: Court didn't say that at all. The Court says that the exception doesn't effect 521 in so far as 521's applicability to the charges in this case are concerned, that's what the Court is saying. Court knows that that is an exception, the Court knows what happened when that legislation was passed, so you can't say that Court doesn't know anything about it, maybe I can't comprehend it, but I understand it.

Mr. Sykes: Well, I misunderstood, I thought Your Honor said that if this were a prosecution under 509, it may be the 509 language would have significance.

Court: Court has a few more gray hairs than you do, Mr. Sykes, and knows a little bit more about the history.

Mr. Sykes: That's perfectly all right, sir, I just wanted to be sure.

[fol. 40] Court: I've lived sixty some years and I believe I know a little bit about this county.

Mr. Sykes: Well, those are the major points that we have to make, the other point which is also important I'll touch on just briefly, and that is the church and state problem. The Court of Appeals upheld the labor statute as a civil regulation, the Supreme Court hasn't passed on it in over a hundred years and this Court is bound by what the Court of Appeals says, that is for the time being. We make the point in order to preserve it for higher review; the point here, however, is that the rationale under which the earlier statute was upheld cannot be invoked today as a matter of civil law for the upholding of the crazy quilt pattern of statutes which is before the Court today. These statutes before the Court today do not uphold or promote any interest that society may have in the provision of a day of rest for the people of this state. If there were only the statutes that there had been in the first place a general statute, generally applicable to all work and labor in Anne Arundel County the Levering case would apply, but today with the pattern of statutes which permits you to spend your Sunday in a beer saloon or dancing saloon to buy anything you want to buy that's customarily sold at bathing beaches, picnic groves or amusement parks and the like, to go bowling, to indulge in all sorts of worldly recreation, and not even recreation, that pattern of statutes can be upheld on the basis that the legislature in its wisdom has provided reasonable means of sanctioning the public interest in a day of rest, and so taking all of these various points, with regard to the conflicts and contradictions and the ridiculousness of the statutes; those things go not only to the question of discrimination and arbitrariness and the like, but they go to the question of religious freedom because the statutes as they are today, as I say, do not or cannot be sustained on the same basis that the earlier general statute was sustained, and so we ask, if Your Honor please, on all these grounds that the motion to dismiss

the warrants be granted, and in order to keep the record clear we haven't had a ruling on any of our motions, we [fol. 41] would like to have leave to get this up the best way we can within a reasonable time and file a written motion nunc pro tunc, so as to comply with the rule requiring the motion being right.

Court: Court explained to counsel, at least commented to counsel in the chambers that it would have the privilege of filing as you're required by the rules all motions in writing that are necessary to be presented as have been done earlier in this case. In other words, motion for a postponement, motion for the prosecution be dismissed and motion for removal of the case, motion for prosecution not being filed in thirty days, and motion that the Sunday law violates the Maryland Constitution, and the motion to have the exhibits filed, which counsel will have to do and the Court has agreed to that, if there are no further arguments the Court will proceed to rule on the motions. As to the motion for postponement, the Court regrets very much that it had to take the position it did in denying the request of eminent counsel for a postponement, but because of what has previously occurred prior to present counsel's association with themselves in the case, up until noon of October the 27th, other counsel representing the same parties had been in contact and communication with the Court over a period of more than a week, and the Court had at least one week ago notified counsel at that time there would be no postponement of these cases today, as far back as October the 2nd. The record shows these parties knew that the machinery of the law and reference to the alleged violations thereof had begun to move, and that there was an attempt to enforce these laws, and that prosecutions were to fall accordingly. So that, the litigants themselves cannot complain to this Court that they have not had adequate time within which to make due, proper and full preparation of their defenses in these cases. And the Court knows, because it has talked with other counsel that they went from one lawyer to another and then finally to you gentlemen, who represents them today, primarily for the purpose of getting these cases postponed, not by counsel but by them as an objective, and the Court feels that it

[fol. 42] owes a duty, with due respect to the law, that such tactics should not be sanctioned or approved by the Court, consequently, much as it regrets to do it, it will have to overrule the motion for a postponement. As for the motion for the prosecution to be dismissed on the grounds presented, namely, upon warrant, where the case is tried upon warrant and not on information or indictment, the Court feels that, procedurally, as far as it's able to analyze the picture there's nothing wrong with the manner in which these cases have been processed, and therefore, that motion will be overruled. As for the motion for removal of the cases, the Court doesn't feel that there's been any undue notoriety or prejudice prevalent on the part of any newspaper items that may have appeared, which as far as the Court's been able to observe, any narration or news items of what has taken place in the county, and that motion will be overruled. The other motions, the Court feels, are not substantial from the Court's analysis of the situation, all motions will be overruled. Counsel may have an exception to the Court's ruling and file whatever papers they desire to file.

Mr. Sykes: I'd like to complete the record and make one more motion, I would like the record to show that the jury was sitting in the court room when the Court made the remarks it did coming from the Court's own knowledge, apparently, as to its reasons for granting the postponement, particularly, the Court's remarks about the tactics of the defendants individually, and the need for respect for the law and the like, and I would urge that the case be postponed on the further ground that the remarks made by the Court to this particular jury panel cannot help by having been prejudicial to the interest of these defendants.

Court: Motion is overruled.

Mr. Duvall: I understand from Mr. Mundy that each of the defendants elect a trial before the Court, and at this time I don't believe I made the motion earlier when these cases were called, the State at this time moves to consolidate these cases for the purpose of trial and ask [fol. 43] defense counsel that that motion be made as initially when I called the case, so that your motions which you have argued apply to all of them in a consolidated form.

Mr. Sykes: I would like the record to show too, if Your Honor pleases, that the election for a trial by the Court is not a completely free election, but was made because of the pressure in counsel's mind induced by the failure to grant the motion for removal, and by the failure to grant the motion for postponement based upon the remarks made to this jury. We do not mean by electing a court trial under these circumstances to waive those motions in any way, we merely try to do the best with what we have without acquiescence in any way.

Court: Court can ask you, gentlemen, how you want these cases tried, before the Court or Jury?

Mr. Mundy: May it please the Court, in view of Your Honor's refusing our motion to remove the cases, we feel obligated to accept a court trial.

Court: Let the record show then, in these various cases 4263, 4264, 4265, 4266, and 4267, and 4268, and 4270 election of court trials has been made by counsel. Does the Court understand, gentlemen, these cases are consolidated for trial by agreement?

Mr. Mundy: By agreement.

Court: Let the record show.

Mr. Duvall: May it please the Court, before proceeding with the first witness I wonder if I may speak with other counsel in the other cases to find out if this jury will be needed today?

#### ARRAIGNMENTS AND PLEAS

Court: Mary Margaret McGowan, stand up, Court will have the Clerk read the charge to you.

(Clerk read the warrant to the traverser.)

Clerk: How say ye, are you guilty or not guilty?

Mary Margaret McGowan: Not guilty.

[fol. 44] Court: How do you wish your case tried, court or jury?

Mary Margaret McGowan: Court.

Court: All right, you may be seated.

Clerk: Nina Lee Shiflett, stand and raise your right hand, please.



(Clerk read the warrant to the traverser.)

Clerk: How say ye, are you guilty or not guilty?

Nina Lee Shiflett: Not guilty.

Court: How do you wish your case tried, court or jury?

Nina Lee Shiflett: Court, on advice of counsel.

Clerk: Herbert Mayers, stand and raise your right hand.

(Clerk read the warrant to the traverser.)

Clerk: How say ye, are you guilty or not guilty?

Herbert Mayers: Not guilty.

Court: How do you wish your case tried, court or jury?

Herbert Mayers: By the Court on advice of counsel.

Clerk: Eugene Louis Hopper, stand and raise your right hand.

(Clerk read the warrant to the traverser.)

Clerk: How say ye, are you guilty or not guilty?

Eugene Louis Hopper: Not guilty.

Court: How do you wish your case tried, court or jury?

Eugene Louis Hopper: Court, on advice of counsel.

Clerk: Samuel Sheps, stand and raise your right hand.

(Clerk read the warrant to the traverser.)

Clerk: How say ye, are you guilty or not guilty?

[fol. 45] Samuel Sheps: Not guilty.

Court: How do you wish your case tried, court or jury?

Samuel Sheps: Court, on advice of counsel.

Clerk: Betty Ruth Sawyer, stand and raise your right hand, please.

(Clerk read the warrant to the traverser.)

Clerk: How say ye, are you guilty or not guilty?

Betty Ruth Sawyer: Not guilty.

Court: How do you wish your case tried, court or jury?

Betty Ruth Sawyer: Court.

Clerk: Dora Margaret Joswiak, stand and raise your right hand, please.

(Clerk read the warrant to the traverser.)

Clerk: How say ye, are you guilty or not guilty?

Dora Margaret Joswiak: Not guilty.

Court: How do you wish your case tried, court or jury?

Dora Margaret Joswiak: Court, on advice of counsel.

Mr. Mundy: May it please the Court, so that there will be no question pleas have been entered of not guilty on the advice of counsel for reasons as counsel stated to the Court, court trial on advice of counsel.

Court: Court will take a recess until 1:00 o'clock, all persons waiting trial return at that time.

(Recess.)

Mr. Mundy: Your Honor, may I respectfully move that all prosecution witnesses be excluded from the court room, that the witness who is testifying, of course, be present, and when he finishes testifying, he again be excluded inasmuch as he might be called in rebuttal?

Court: The same will be applicable to the defendants. [fol. 46] Mr. Mundy: Yes, Your Honor, not the defendants themselves, but our defense witnesses.

Court: That's right. All witnesses who are to testify for the State and all witnesses who are to testify for the defendants will retire from the court room and make themselves available for call when needed.

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ASHLEY VICK, a witness, of lawful age being first duly sworn, deposes and says:

Mr. Duvall:

Q. Will you state your name and occupation, please?

A. Ashley Vick, a member of the Anne Arundel County Police Department.

Q. Sgt. Vick, were you on duty September 28th of this year?

A. I was, sir.

Q. What hours were you on duty on that date?

A. 8 a.m. to 4 p.m.

Q. And while you were on duty on September 28th, did you have occasion to be in the vicinity of Glen Burnie in this county?

A. Yes, sir.

Q. On that date did you have occasion to visit any mercantile establishments in this county?

A. Yes, sir.

Q. What establishments did you visit and approximately what time?

A. We went to Sanitary Food Market in Glen Burnie at approximately 11 a.m., from there we came to Carr's Corner at Routes 450 and 178 approximately 12, approximately noon, we came straight from Sanitary down there then we proceeded back to Glen Burnie and went to the Two Guys store in Glen Burnie.

Q. Where is this store located?

A. It's on Ritchie Highway.

Q. And what did you do when you went to the place you identified as Two Guys store?

[fol. 47] A. We went to the store, Corporal Kiessling and I went in the same car and we both got out of the car and went into the store; I went to the counter and picked up one three ring loose leaf binder and one can of Simoniz floor wax, I took it to a counter and was checked out by a subject later identified as Margaret Mary McGowan.

Q. Now, do you have that three ring loose leaf binder and that can of Simoniz in court today?

A. Yes, sir.

Q. Would you get it, please?

Mr. Duvall: At this time I offer in evidence the three ring loose leaf binder as State Exhibit No. 1, and the can of Simoniz Vinyl Floor Wax as State Exhibit No. 2; and the bag in which these articles were contained as State Exhibit No. 3.

Court: Admit them.

(Loose leaf binder marked State Exhibit 1.)

(Can of simoniz floor wax marked State Exhibit No. 2.)

(Bag marked State Exhibit No. 3.)

Mr. Duvall:

Q. What, if anything, did you pay for these articles, Sgt?

A. Sixty Nine Cents for the loose leaf binder, seventy cents for the can of Simoniz floor wax, and there was three cents tax, or a total of One Dollar and Forty Two Cents.

Q. And where you paid for these articles were there any other persons or person at the check out counter other than the person you identified as Mary Margaret McGowan?

A. Yes; there was a lady later identified as Dora Margaret Joswiak, 305 Furnace Branch Road, Glen Burnie.

Q. And what, if anything, did Dora Margaret Joswiak do?

A. She bagged the articles.

Q. After you had purchased them?

A. Yes, sir.

Q. Did you have any conversation with either of these persons, Sergeant?

A. Not prior to the purchase.

[fol. 48] Q. Now, at the time you went in this store were you the only customer there?

A. No sir.

Q. Would you describe, generally, the premises to the Court?

A. It's a very large store, it's laid off in sections, you have a shoe section, a dry good section, hardware section, domestic counter, and have a checker for each area.

Q. And in which section did you obtain the items which have been offered in evidence?

A. I don't know what the name of this section was, it didn't have any right where I purchased, but it was where you could get school supplies, mops and things of that nature.

Mr. Duvall: Witness with you.

Cross examination.

By Mr. Mundy:

Q. Sergeant, I have just one or two questions; the first store you visited was the Sanitary Store?

A. Sanitary Food Market off Ritchie Highway in Brooklyn Park.

Q. Did you make any purchases there?

Mr. Duvall: Objection, I don't think it's relevant for the purpose of this case, what may have been done or not been done other than this location.

Mr. Sykes: It's offered in our point of discriminatory courses.

Court: Court will overrule the objection.

Witness: No sir, we were turned down at the Sanitary Food Market, being quite sure that we had been recognized as being police officers. A sale was made later on in the day at Sanitary Food Market by another police officer.

Mr. Mundy:

Q. What was purchased at that Sanitary Market later in the day?

A. I don't know, sir.

[fol. 49] Q. Then you visited a second store, I understood you to say, some of these names are unfamiliar to me, Carr's Corner?

A. Yes, sir, we came to Carr's Corner.

Q. That's a store?

A. That's a grocery store, yes sir.

Q. And you arrived there about noon, did you make any purchases at that store?

Mr. Duvall: Objection.

Court: Overruled.

Witness: We were refused a purchase at Carr's Corner.

Mr. Mundy:

Q. The store was open?

A. Yes sir.

Q. It was a grocery store, you say?

A. Yes sir.

Q. What did you attempt to purchase?

A. A can of coffee.

Q. What reason was assigned for refusal?

Mr. Duvall: Object to that.

Court: Sustained.

Mr. Mundy:

Q. When did you make your first Sunday arrest, Sergeant?

A. On September 28th, 1958.

Q. Had you made any Sunday arrest prior to that?

Mr. Duvall: Objection.

Court: Overruled.

Witness: Not of this nature, sir.

Mr. Mundy:

Q. Did you make any purchases on Sunday prior to September 28th?

Mr. Duvall: Object again for the record.

Court: Overruled.

[fol. 50] Witness: Would you repeat that question?

Mr. Mundy:

Q. Did you make any Sunday purchases prior to September 28th?

Court: I think the State is probably right. Court will have to sustain the objection, that question is so broad, you're trying to get at the purchase in violation of the law, purchase legal items then you wouldn't have any interest for any of them.

Mr. Mundy: I quite agree with Your Honor, I think it was very poor judgment.

Q. Did you make any Sunday purchases prior to September 28th of articles that are prohibited from Sunday selling?

Mr. Duvall: Objection, calls for a conclusion of the witness.

Court: Sustained.

Mr. Mundy:

Q. When did you first attempt to, personally, to enforce the Sunday selling law?

Mr. Duvall: Objection.

Court: Sustained.



Mr. Mundy:

Q: What purchase did you make on Sunday prior to September 28th?

Mr. Duvall: Objection, that's the previous question rephrased, too broad.

Court: Sustain the objection.

Mr. Mundy:

Q: What instructions did you receive from your superior officer as to making purchases on Sunday prior to September 28?

[fel. 51] Mr. Duvall: Objection.

Court: Overruled, we'll let him answer it, Court can't see where this line of questioning has anything to do with it, but it doesn't want to shut off anything that may be relevant, it isn't a question of instructions in this case at all.

Witness: September the 28th is the first day that I attempted to enforce this particular law, sir.

Mr. Duvall: Move to strike that answer, it's not being responsive to the question.

Court: Strike it out.

Witness: May I ask the gentleman to repeat the question?

Mr. Mundy:

Q: In the line of official duty, did you make any Sunday purchases prior to September 28th?

Mr. Duvall: Objection.

Court: Let him answer it. As long as this is before the Court, the Court in its own mind, whether there's an objection or not is going to toss out the irrelevancy and stick to the relevancy in this case, you gentlemen might just as well know it, whether I sustain or overrule, go ahead answer it.

Witness: No sir.

Mr. Mundy:

Q. Did you make any Sunday purchases after September 28th?

Mr. Duvall: Object for the same reason.

Court: Overruled.

Witness: Yes sir.

Mr. Mundy:

Q. On how many Sundays?

Mr. Duvall: Object again.

[fol. 52] Court: Overruled.

Witness: On the following Sunday, sir.

Mr. Mundy:

Q. And is that the only Sunday aside from September 28th?

A. Yes sir.

Court: That wouldn't be prior to September 28th, that would be after.

Mr. Mundy: I said aside from September 28th.

Court: Aside?

Mr. Mundy: Yes sir.

Q. Now, I don't ask you where you made those later purchases, but what articles did you purchase?

Mr. Duvall: Object.

Court: I don't know what relevancy that has, if he bought them in a hundred places here or bought them in only one, the number of places don't shed any light on this situation, I'll sustain the objection.

Mr. Mundy:

Q. Did Corporal Kiessling go into the Two Guys Store with you on September 28th?

A. Yes sir.

Q. You took from the racks, I presume, the binder and the floor wax; is that correct, Sgt.?

A. Yes, it is, sir.

Q. And after you took those articles where did you go?

A. To the check-out counter.

Q. And you said you paid sixty-nine cents for the binder and seventy for the floor wax?

A. Yes sir.

Q. And the total was how much?

A. One Dollar and Forty Two Cents (\$1.42), including three cents tax.

Q. Whom did you pay the money to?

A. Mary Margaret McGowan.

[fol. 53] Q. And Miss or Mrs. Joswiak merely put those two items in a bag, is that correct?

A. Yes.

Q. After you had paid the money to Miss McGowan?

A. Yes sir.

Q. When you received your instructions as to the enforcement of the Sunday law, were you instructed as to the items you were to purchase?

A. No sir.

Q. That was left to your judgment, was it?

A. Yes sir.

Q. How did you happen to select the floor wax and the binder?

A. I picked those articles because I didn't think they came within the things that could be sold legally on Sunday.

Q. Were you considering when you reached that conclusion the things that might be sold at beaches?

Mr. Duvall: I'll object to this line of questioning again, sir, he has posed to the witness a possible legal question.

Court: Court will sustain the objection.

Mr. Mundy:

Q. When did the Anne Arundel County Police Department start to enforce the Sunday law?

Mr. Duvall: Objection.

Court: Sustained.

Mr. Mundy: Your Honor, so that you'll have my reasoning, I'm trying to show a lack of uniformity in enforcement, I don't press the question, Your Honor has ruled and I abide by the rules.

Q. Sgt. can you identify Miss McGowan in the court room today?

A. Yes sir, the lady on the left.

Q. Can you identify Miss Joswiak?

A. Yes sir.

Q. Which one is she?

A. The lady on the other end in the pink coat.

[fol. 54] By Mr. Duvall:

Q. Is Corporal Kiessling in the court room today?

A. No sir.

Q. Do you know his present whereabouts?

A. No sir, he's on vacation.

Q. You know he is on leave from the department?

A. Yes sir.

Mr. Duvall: Thank you, Sgt.

MAXWELL FRYE, a witness of lawful age, being first duly sworn, deposes and says:

Direct examination.

By Mr. Duvall:

Q. Will you state your name and occupation, please?

A. Sgt. Maxwell Frye, Anne Arundel County Police Department Ferndale.

Q. Sgt., were you on duty September 28th, 1958?

A. I was.

Q. What day of the week was that?

A. Sunday.

Q. What hours were you on duty that date?

A. From 8 a.m. to 4 p.m.

Q. And while you were on duty September 28th, did you have occasion to go to any mercantile establishments in the vicinity of Glen Burnie in this county?

A. I did.

Q. What establishment did you go to Sgt.?

A. Two Guys Store, Glen Burnie.

Q. Where is it located?

A. Ritchie Highway just north of the center of the town of Glen Burnie.

Q. Approximately what time did you go to the store?

A. 1:30 p.m.

[fol. 55] Q. And what did you do upon arrival?

A. I went to the hardware section of the store and viewed the articles for sale there.

Q. And at that time did you make any purchases?

A. I did. I purchased a stapler and staples.

Q. Now, at the time you purchased this stapler and staples did you receive any assistance from any person at the store?

A. I did.

Q. From whom did you receive assistance?

A. From Mr. Hopper.

Mr. Mundy: May it please the Court, I move that the answers to the last questions be stricken out; the questions were leading and another vice of the questions is that assistance is rather a broad word.

Court: Court will sustain the objection, re-phrase the question.

Mr. Duvall:

Q. Tell the Court just what occurred when you obtained the stapler and the staples.

A. I entered the hardware section, looked over the materials and selected a stapler, nearby was a salesman that was someone connected with that section of the store and I asked him for assistance in locating staples for the stapling gun and showing me the other stapling guns. I selected the one that I later purchased, he got the staples for that stapling gun and I took the package, or rather he did, wrapped it and I went to the cashier and purchased it.

Q. Now, did that person identify himself to you?

A. He did after I made the purchase.

Q. And who was that person?

A. A Mr. Hopper.

Q. And at the time he identified himself to you did he make any statement whatsoever as to what his capacity was at this particular store?

A. No, he didn't, as well as I can recall, I asked him if he had worked there before I asked him to help me select the stapling gun and the staples.

Q. What, if anything, did he say in reply to that question?

A. He said he would assist me in my selection.

Mr. Mundy: What was the answer, Sgt., please? What was the question that you asked him?

A. I asked him if he worked there and he said he did, and he aided me in my selection.

Q. He did what?

A. He aided me in my selection.

Q. He made no answer to your question?

A. He aided me in my selection, he said he worked there.

Mr. Duvall:

Q. Do you have the stapler in court, Sgt.?

A. It is.

Q. Will you examine the contents of that envelope?

A. This is the stapling gun and staples that I purchased.

Mr. Duvall: May it please the Court, I offer at this time a stapling gun with a box of Swingline No. 401-5 staples with the container in which these objects are placed as State Exhibit No. 4.

Court: Admit it.

Mr. Duvall: I should also like to include in that as a single exhibit a bag in which this box was kept.

(Stapler and Staples marked State Exhibit No. 4.)

(Bag marked State Exhibit 5.)

Q. Now, Sgt., I hand you another object and ask you if you can identify that object?

A. Yes sir, that's the receipt for the purchase of the stapling gun and staples.

Mr. Duvall: I offer that in evidence as State Exhibit 6.

(Receipt marked State Exhibit No. 6.)



Q. Now, what, if anything, did you pay for the stapling gun and staples?

A. Four Dollars and Fifty Cents (\$4.50).

Q. After you obtained those items what did you do, that is, from where they were located in the store, what did you do?

A. Do you mean after they were purchased?

[fol. 57] Q. No, after you picked them up and you testified that a person, Mr. Hopper, did certain things then what did you do?

A. I paid for them at the cash register, paid the cashier for the articles.

Q. And who was that person?

A. A Mrs. Schiflett, Nina Lee Shiflett.

Q. Did you have any conversation with her at the time you made the check-out of these articles?

A. No, I didn't.

Q. Did you, after you checked out the articles have any conversation with her?

A. I did.

Q. What conversation did you have with Mrs. Shiflett?

A. She was advised I was with the police department and that she was being placed under arrest for violation of the blue laws.

Q. Did you make any inquiry, did you make any further inquiry of her?

A. I don't recall if I did, I asked her if the manager was in the hardware section, she advised he was.

Q. Did she identify that person?

A. She did.

Q. Who was that person?

A. Samuel Scheps.

Q. And where was he at the time you first saw him?

A. He was right there in the hardware section near the cash register.

Q. Did you have any conversation with this person who was pointed out to you by Mrs. Schiflett as being the manager, Samuel Scheps?

A. I did, I asked him if he were manager and he stated he

was, I advised him that he, also, was under arrest for violation of the blue laws.

Q. Now, after that step was taken did they consult with any other person there?

A. Not until after I had asked them who the overall manager was of Two Guys Store, and at that time they advised me who it was, and I went after him and I brought him down to that section.

Q. Who went after him?

A. I don't recall just which one went after him, but, someone from the hardware section went after him.

[fol. 58] Q. And was a person brought to where you were?

A. Yes, he came down to where I was.

Q. And who was that person?

A. Herbert Mayers.

Q. And did you have any conversation with this person who identified himself as Herbert Mayers?

A. I asked him if he was manager of the Two Guys and he stated he was at that time, and then I told him that he was under arrest also for violation of the blue laws.

Q. Did you have any further conversation with the defendant, Herbert Mayers?

A. He wanted a few minutes time to put money away or his affairs straightened at which he was permitted to do before being taken to police headquarters.

Q. Did you have any further conversation with the person identified as Samuel Schepps?

A. No sir.

Q. Did you have any further conversation with a person identified as Mrs. Nina Schifflett?

A. No sir, not that I know of.

Q. Did you have any further conversation with a defendant identified as Eugene Hopper?

A. No sir.

Q. Were you alone when you made or conducted this activity, Sgt.?

A. I was alone at the hardware section of the store, other officers were in various parts of the store.

Mr. Duvall: Witness with you.

Cross examination.

By Mr. Mundy:

Q. Sgt., were you in the court room when Sgt. Vick testified?

A. No sir.

Q. Have you made Sunday purchases in any other stores?

A. Yes sir.

Q. When did you make the first purchase?

Mr. Duvall: Object again for the record.

[fol. 59] Court: Overruled.

Witness: My first purchase was made on the same date earlier in the morning.

Mr. Mundy:

Q. Had you made any Sunday purchases prior to September 28th?

Mr. Duvall: Object to that.

Court: Overruled.

Witness: No sir.

Mr. Mundy:

Q. Did you make any purchases after September 28th on Sundays?

Mr. Duvall: Object.

Witness: Yes sir.

Mr. Mundy:

Q. At what store did you make your other purchases on September 28th?

Mr. Duvall: Objection.

Court: Repeat the question the Court didn't hear it.

Mr. Mundy:

Q. At what store did you make your other purchase on September 28th?

Mr. Duvall: The State objects.

Court: Overruled.

Witness: Sanitary Food Market, Ritchie Highway, Brooklyn; Sun Ray Drug Store, Ritchie Shopping Center at Church and Ritchie Highway, Brooklyn, that's all I can recall.

Mr. Mundy:

Q. What did you purchase at Sanitary?

[fol. 60] Mr. Duvall: Objection.

Court: I don't know what the purpose of this line of questioning is, I'll permit it.

Witness: Sanitary, I'll stand to be corrected, Corporal Disney made the purchase, I was present with him.

Mr. Mundy:

Q. You made no purchase at Sanitary?

A. No, he made the purchase, I was with him.

Q. What was that purchase?

A. A jar of coffee and a package of cigarettes.

Q. And did you say you made no other Sunday purchases after September 28th?

A. I have, yes sir.

Q. What articles did you purchase on other Sundays after September 28th?

Mr. Duvall: Object to that.

Court: Overruled.

Witness: I would have to check the reports, they're in another room to answer that.

Mr. Mundy:

Q. Now, when you made the purchases at Two Guys on September 28th, to whom did you pay the money?

A. Mrs. Schiflett.

Q. You said that it was Mr. Hopper that gave you assistance?

A. That's correct.

Q. You were asked by Mr. Duvall whether you ques-

tioned Mr. Hopper, and you said you asked him whether he was an employee there, is that correct?

A. I asked him if he was an employee there, yes.

Q. Did he say that he was an employee there?

A. Yes, he did, and he offered to help me in my selection.

Q. You answered that question twice by saying, not that he told you that he was an employee, but gave you assistance, I ask you, why did you answer the question twice in that manner?

Mr. Duvall: I'll object to that because I don't think Mr. Mundy has phrased his answer correctly to the questions that were asked.

Court: The only thing we can do is to have the reporter play back what was asked and what was answered, Court can't remember each thing that you say.

(Reporter reads back the questions and answers in question.)

Mr. Mundy:

Q. Sgt., in order which person did you see first, did you see Mr. Hopper?

A. That's correct.

Q. And was that before you paid the price of the article?

A. That's correct.

Q. And next was it Mrs. Schiflett?

A. That's correct.

Q. Was that also before you paid the purchase price?

A. I saw her immediately before and immediately after.

Q. And then the next was Mr. Schen?

A. That's correct.

Q. And was that before or after you paid the purchase price?

A. After.

Q. And Mr. Mayers also after you paid the purchase price?

A. That's correct.

Q. You made payment only to one person and that was Mrs. Schiflett?

A. That's correct.

Q. Was it Mrs. Schifflett who gave you the receipts, State Exhibit 6?

A. That's correct.

Q. And that receipt has marked on it "merchandise purchased under Article 509 Maryland Code"?

Mr. Duvall: Object to that, the receipt speaks for itself.

Mr. Mundy: It's, of course, in evidence, Your Honor, offered by the State.

[fol. 62] Court: Well, let the Court look at it.

Mr. Mundy:

Q. Did you have any conversation with Mrs. Schifflett about that receipt?

A. I don't recall, it seems to me at this time, at one time I was in the Two Guys I did question what they were putting on the back of the receipts; but I was there more than once and I don't recall whether it was that time or not.

Q. And what was that conversation?

Mr. Duvall: I'll object if the Sgt. can't fix it with regard to this particular person, Mrs. Schifflett.

Mr. Mundy: He said it might have been on this occasion, may it please the Court, and I think I have a right to pursue in cross-examination.

Court: Go ahead, cross-examine him.

Witness: I don't recall the entire conversation, I do recall asking what it was that was being stamped on the reverse side of the receipt, the reply, I can't recall or any further conversation.

Court: Court would like to know something right there. Look at that receipt, Officer. Do I understand that that printed material on there was not placed on there by you?

Witness: It is not, I didn't place it on there, no sir.

Court: Do you know who did place it on there?

Witness: Mrs. Schifflett stamped it on with a rubber stamp.

Court: All right.



Mr. Mundy:

Q. You can't recall the conversation?

A. I recall what I mentioned, the reply, I don't recall that.

Q. How long have you been on the Anne Arundel County Police force?

A. Seven years and ten months.

[fol. 63] Q. What was your occupation prior to police work?

A. I was a Sun paper route salesman.

Q. How did you happen to buy these particular items, Sgt.?

A. I went into the hardware section, I noticed that there were several items not on the list of those permitted to be sold, and I just happened to select gun at random.

Q. Was September 28th the first day that you were instructed to enforce the Sunday law?

Mr. Duvall: Objection.

Court: Overruled.

Witness: Yes, it was the first time I'd been instructed.

Mr. Mundy:

Q. Had there been any enforcement of the Sunday law prior to September 28th?

Mr. Duvall: Objection.

Court: Overruled.

Witness: I haven't done any myself.

Mr. Mundy:

Q. To your knowledge, had there been any enforcement of the Sunday law by the Anne Arundel County Police Force prior to September 28th?

Mr. Duvall: Object.

Court: Court is allowing this, but it's saying to you very frankly it doesn't see where it has any bearing on it as far as Court can see.

Witness: I can only answer back to January 1st, 1951, that I don't know of any.

Cross examination.

By Mr. Sykes:

Q. I'm sorry, I didn't quite understand your answer. You said January of 1951.

A. I can answer back that far, January 1st, 1951, I don't know of any.

[fol. 64] Q. No enforcement between January of 1951 and September 28th of 1958, to your knowledge?

A. Not to my knowledge, no.

Mr. Mundy:

Q. Did you mention a moment ago a list of articles that were permitted to be sold on Sunday, maybe I'm misquoting your testimony, if so I don't intend to?

A. Yes, those specified by the law, ice cream, cigarettes, newspapers.

Q. Now, who gave you that list, Sgt.?

A. We have copies of it at the police station.

Q. Do you have available a copy of that list or one of those list?

A. I don't have any here, it doesn't only list the articles, I think, it's more or less like it is in the book, I'm not too sure, maybe Mr. Duvall can answer that.

Q. Now, the list that you just referred to, when I first asked you the questions on how you selected these items you said you selected them from a list, am I correct in the way I quote your testimony?

A. No sir, I didn't say that.

Q. What did you say then?

A. I said I went into the hardware department and in that section I looked over several items and none of them were on the list of the things allowed to be sold.

Q. Now, what list did you have in mind when you made that answer, Sgt.?

A. The one in regard to ice cream, tobacco, cigarettes, newspapers.

Q. Sgt., have you a copy of that list available?

A. I don't have one here, but I can get one.

Q. At the police department?

A. Yes sir.

Q. Would you be kind enough if there is a recess to obtain a copy for us?

A. Yes sir, we can get one sent down.

Court: Court wants to ask, did that list whatever it may have contained, contain the articles that you bought?

Witness: No sir.

Court: All right.

Mr. Mundy: No other questions, may it please the Court.

[fol. 65]            Redirect examination.

By Mr. Duvall:

Q. Sgt., the paper that you referred to as the list, was that itemization of specific articles or was that quotation a verbatim copy of a specific section of the code, namely, the section we're concerned with today?

Mr. Sykes: I object to this testimony about the list, he's going to produce it and then it will speak for itself.

Court: Well, he may have his memory refreshed if he made an inaccurate statement, I don't know whether he has the list or hasn't the list. I think the State has the right to try to pinpoint this to see whether or not he's referring to a list as listed in the statute which he saw or separate unrelated list. Objection overruled, proceed.

Witness: It's a copy of the items that could and are allowed to be sold, as well as, the penalties and so on, I think it's an exact copy of what's in the law, it's furnished to us, it's not just a list of certain items.

Mr. Duvall: I have no further questions.

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RICHARD S. DISNEY, a witness of lawful age being first duly sworn, deposes and says:

Direct examination.

Mr. Duvall:

Q. Will you state your name and occupation, please?

A. Richard S. Disney, Corporal Detective, Anne Arundel County Police Department, stationed at Ferndale.

Q. Were you on duty September 28th of this year?

A. I was, sir.

Q. What day of the week was that?

A. That was Sunday.

[fol. 66] Q. And on that date did you have occasion to visit any mercantile establishments on or about the vicinity of Glen Burnie in this county?

A. I did, sir.

Q. What establishments did you visit, Corporal?

A. It was a store on Ritchie Highway, located in Glen Burnie, known as the Two Guys from Harrison.

Q. Approximately what time did you go to that store?

A. It was approximately 1:30 p.m.

Q. And what did you do when you arrived at the store?

A. I went into the toy department and picked up a toy submarine, and took it out to the cashier and received, I paid a Dollar and Forty Two Cents (\$1.42) for it, the price was a Dollar Thirty Nine Cents (\$1.39) plus three cents sales tax.

Q. And who was the person to whom you paid that money?

A. It was Miss Betty Ruth Sawyer, salesgirl.

Q. Now, I hand you a package and ask you to open it, Corporal, what is the object you've just handed me, Corporal?

A. It's a toy submarine, known as the U. S. S. Nautilus, 571.

Mr. Duvall: I offer this toy submarine, its package, its specific container, the bag in evidence as a single exhibit, State Exhibit 7.

(Toy Submarine, Box and Bag filed herewith marked State Exhibit No. 7.)

Court: Admit it.

Mr. Duvall:

Q. What is the object which I hand you now, Corporal?

A. This is the 1 sales slip, more or less a receipt.

Q. Where did you obtain that?

A. That was from the sales girl, Betty Ruth Sawyer.

Mr. Duvall: I offer that as State Exhibit 8.

Court: Admit it.

[fol. 67] (Receipt filed herewith marked State Exhibit 8.)

Mr. Duvall:

Q. Did you have any conversation with Miss Sawyer at the time you made this purchase or payment on this toy submarine?

A. After I made the purchase and I was about to leave I advised her that she just violated the Sunday Blue Law and that she was under arrest.

Mr. Duvall: Witness with you.

Cross examination.

Mr. Mundy:

Q. Did you place her under immediate arrest, Corporal?

A. Yes, she was taken, she walked out from behind her booth and went out into the hallway and waited in line for transportation to Ferndale.

Q. To the police station headquarters?

A. Yes, sir.

Q. The others were taken out also? You weren't present then when they were taken?

A. No sir.

Q. Did you have a warrant when you went in the store?

A. No sir.

Q. When did you get the warrant?

A: I never did get a warrant, that was obtained the next day, she was taken to the Ferndale Police Station where she was booked on the charge and placed at \$52.50.

Q. And the warrant was obtained on Monday?

A. Yes sir.

Q. Was that true in these other cases, the warrant was obtained the following day?

Mr. Duvall: If he knows.

Witness: I wouldn't know, sir, I wouldn't know that.

Mr. Mundy:

Q. How many officers went into the Two Guys on September 28th?

A. All I can account for is Sgt. Frye and myself, we [fol. 68] were working together, there were others there but I couldn't state.

Q. Did you know that Sgt. Vick went into the store on that day?

A. I saw him there.

Q. When you were there?

A. Yes sir.

Q. Did you know that Corporal Kiessling went in that store?

Q. Yes sir, I saw him there too.

Q. So you saw three then, is that correct; you saw Sgt. Vick, Sgt. Frye and Corporal Kiessling?

A. Yes sir.

Q. Did you four officers go into any other stores on that particular Sunday?

Mr. Duvall: Objection.

Court: I'll sustain it, if you ask him what he did, I think as to what the others did, no.

Mr. Mundy:

Q. Did you go into any other stores on September the 28th?

Mr. Duvall: Object to this and move to strike the answer on my previous objection, sir.

Court: Court overruled the objection.



Mr. Mundy:

Q. Would you answer, please, Corporal?

A. Yes sir, I did.

Q. Did you make any purchases in the other stores?

Mr. Duvall: Object to that.

Court: Overruled.

Witness: Yes sir, I did.

Mr. Mundy:

Q. Did you make arrest of the persons who sold you articles in the other stores?

[fol. 69] Mr. Duvall: Objection.

Court: Overruled.

Witness: Yes sir.

Mr. Mundy:

Q. Had you made any arrest for the violation of the Sunday law prior to September 28th?

Mr. Duvall: Object.

Court: Let him answer it.

Witness: What was that question again?

Mr. Mundy:

Q. Had you made any arrest for the violations of the Sunday law prior to September 28th?

A. No sir.

Q. Have you made any arrest since September 28?

Mr. Duvall: Objection.

Court: Overruled.

Witness: Yes sir.

Mr. Mundy:

Q. For violation of the Sunday laws?

A. Yes sir.

Q. How many Sundays after September 28th did you make arrest?

Mr. Duvall: Objection.

Court: Overruled.

Witness: Approximately two or three; could be three.

Mr. Mundy:

Q. Corporal, State's Exhibit 7 is, as you have stated, a toy submarine?

A. Yes sir.

Q. Have you ever seen children play with submarines of that type?

[fol. 70] Mr. Duvall: Objection.

Witness: No, sir.

Mr. Mundy:

Q. You never have? Have you ever been around beaches?

A. Yes sir.

Q. Have you ever seen a child play with a toy of that sort around the beach?

Mr. Duvall: Objection.

Court: Let him answer it, I don't know what he's getting at, anything to help it.

Mr. Mundy:

Q. Corporal, have you ever seen a child play with a toy of this sort around the beach?

A. Off-hand, I can't remember.

Court: They don't play with a nautilus; the nautilus has just come into being.

Mr. Mundy:

Q. Do you know whether toys of this sort are customarily sold around beaches?

Mr. Duvall: Objection.

Witness: I couldn't state to that, I've never purchased any.

Mr. Mundy:

Q. Have you ever seen toys of this sort sold around beaches?

Court: Well, the essence of this is whether this was sold at the beach or at an amusement park.

Mr. Mundy: I have in mind Section 509, it is not illegal to sell articles that are customarily sold at, or incidental to, the operation of the aforesaid occupations—

Court: Court regrets it has to disagree with you, and that's that.

[fol. 71] Mr. Mundy: Well, I'll, of course, abide by your ruling, then Your Honor has sustained an objection to my question?

Court: The Court has given you latitude to try to present anything that counsel feels is properly presentable to defend the charges that the defendants had charged against them by the state, as it feels in indicating in ruling on the motion; what occurs or what is permitted in Section 509 is one thing; what the charges are in Section 521 are another if the exception does not justify straining it whereas to make it come within the purview of exceptions of 521, that's the long and short of it.

Mr. Mundy: Then, Your Honor, I'm not going to follow this—

Court: You have a right to except to the Court ruling, you make it a record.

Mr. Mundy: In other words, as I understand the Court's ruling, which I very cheerfully abide by, I am not permitted to ask this witness whether an article such as State Exhibit 7 is customarily sold or is incidental to the operation of a bathing beach?

Court: For the simple reason that the charge here is not charged violating Section 509 of Article 27.

Mr. Mundy: Then I, of course, will follow the Court's ruling and ask no more questions along that line. That's all, thank you.

Mr. Duvall: I'd like to recall Sgt. Vick.

Court: Call Sgt. Vick.

ASHLEY VICK, recalled.

Q. Sgt. what day of the week was September 28th when you conducted the activities testified to in your statement before?

A. Sunday.

[fol. 72] Mr. Mundy:

Q. Sgt., may I ask you a question, you were the first witness who testified for the state, were you not?

A. Yes sir.

Q. When you finished your testimony did you leave the court room?

A. No sir.

Mr. Mundy: May it please the Court, I move for a mistrial on the ground that this witness, I'm sure not intentionally, did not follow the Court's instructions.

Court: The motion is overruled, I think perhaps on other occasions we have permitted some of the witnesses to remain in Court on both sides when they finished with their testimony, unless there's some particular request for it the Court doesn't make that binding on them all the way through the course of the trial; if the request is made that they be excluded entirely during the course of the trial then the Court would justifiably do it, if necessary to do it, do that, but that has happened here on occasion that a witness has gotten through and without anybody knowing anything about it has sat down here and just listened to what's going on.

Mr. Mundy: May I respectfully remind the Court, that when we made the motion to exclude the witnesses we specifically asked that they be excluded after they took the witness stand.

Court: Court never heard that.

Mr. Mundy: May I have the motion read, I may be mistaken.

Court: Court understood you to say that all the witnesses, first you said the witnesses for the state only,

that's what I believe you said, to be excluded from the court room.

Mr. Mundy: No, Your Honor, I believe I could be mistaken.

[fol. 73] Court: Court said it was also applicable to the defendant and they would also be excluded.

Mr. Mundy: Your Honor, may I have the motion read, I could be mistaken, that the motion specifically asked for the exclusion of the witnesses after the witness had testified, and I think I mentioned—

Court: If you can show what this witness has just testified has in any way prejudiced or jeopardized the defendant's rights the Court will be glad to entertain it, that's usually the basis for it that somebody has heard something and been able to correct his testimony and is now maybe making a mis-statement or trying to correct what he has testified to about before, you don't have that in this case, what's the use of kidding yourself.

Mr. Mundy: Your Honor, I make the motion because if I'm not mistaken I'm glad to be corrected from the record, but the witness has, unintentionally, I'm sure, violated the Court's instructions.

Court: Then that's a matter for the Court to determine whether or not he's violated.

Mr. Mundy: Counsel says he has.

Court: But the Court didn't feel that this thing was so all inclusive that it had to specifically point out, or if it had said so, each of these witnesses must remain out of this court room during the entire course of this trial unless called as a witness, then I'd think you'd be one hundred per cent correct. Court simply did this in a general way, these officers know from prior experience in this court the general tenure of that situation because they have been requested on prior occasions to retire from the court room, both witnesses for the defense and witnesses for the state, and have themselves available when called, that's been the practice here. In spite of that, the Court says, if Counsel can show to this Court whereby the rights of the defendants by the answers given to the limited questions asked here have jeopardized or prejudiced the

rights of the defendants in any way, the Court will grant you a new trial.

[fol. 74] Mr. Mundy: Your Honor, I'm not going to labor the point, I have just this brief comment, I believe, that I specifically included exclusion in my motion; secondly, I think under the rule we have the right to exclusion without showing that there might possibly be prejudiced, that's all I have to say.

Court: Anything further from the officer?

Mr. Duvall: The State has nothing further.

Court: Step down, go outside the court room, don't stay in here, they don't want you in here.

Mr. Mundy: Now, I do want to find out whether Sgt. Frye has been in the court room and Corporal Disney.

Court: Is Sgt. Frye in here and Corporal Disney in this court room?

Mr. Duvall: The State rests.

#### MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Mundy: May it please the Court, may we move in behalf of each defendant, individually, for a motion for a directed verdict on the ground that there has been no adequate evidence to justify defense putting on its case.

Court: Do you want to be heard?

Mr. Mundy: Not particularly, Your Honor.

Court: The motion is overruled. Proceed.

Mr. Mundy: May we ask if Captain Wade is in the court room, I think he was here this morning.

Court: Is Captain Wade here? Sheriff, see if Captain Wade is outside.

Mr. Mundy: In the meantime, may I ask Sgt. Frye to come in?

Court: Tell Sgt. Frye to come in, Sheriff. Captain Wade is here. Do you want Captain Wade, he's here?

Mr. Mundy: Yes, please. Captain, would you take the stand, please.

[fol. 75] WILBUR C. WADE, a witness of lawful age, being first duly sworn deposes and says:

Mr. Sykes:

Q. Would you state your name and address, please?

A. Wilbur C. Wade, Chief of Police, Anne Arundel County Police Department.

Q. How long have you been Chief of Police for Anne Arundel County, sir?

A. Four years.

Q. And prior to that time were you employed in the department?

A. Yes sir, I was.

Q. In what capacity?

A. Captain for four years, Lieutenant for eight years, Sergeant for two years, Patrolman for four years.

Q. That's a total of how many years in the Anne Arundel Police Department?

A. Around 27 years.

Q. Now, during your experience in connection with the Anne Arundel Police Department, can you tell me what was the pattern of enforcement, if any, of the so-called Sunday Blue Laws?

Mr. Duvall: Objection.

Court: Overruled, you can answer.

Witness: We only investigated complaints, we had some complaints last year, at that time we didn't make an arrest, we warned the people that were violating the law, to quit selling on Sunday.

Mr. Sykes:

Q. The first warning then, was given last year?

A. As far as I can recall, we warned two business places.

Q. To your knowledge, had there been violations of the Sunday laws, Blue Laws, during this period of time that we'd been talking about?

Mr. Duvall: Objection.



[fol. 76] Mr. Sykes:

Q. Other than those that you gave warnings of?

Mr. Duvall: Objection.

Court: Overruled.

Witness: Well, actually, I had never made a purchase myself, and as far as visiting different business places, I would be unable to testify under oath that the law was violated, although, certain business places were open, but I never went into any of these places.

Mr. Sykes:

Q. What can you state about the generality of the condition of having business places open on Sunday?

Mr. Duvall: Objection.

Mr. Sykes:

Q. During that period.

Mr. Duvall: Objection.

Court: Sustained.

Mr. Sykes:

Q. Can you state what sort of business establishments were open on Sunday during this period?

Mr. Duvall: Objection.

Court: Sustained.

Mr. Sykes:

Q. I understand from previous testimony that September 28th of this year was the first day on which instructions were given to members of the Anne Arundel County Police Department to attempt to enforce the Sunday Blue Laws, is that correct?

Mr. Duvall: Objection.

Court: Overruled, you can answer it.

[fol. 77] Witness: I wouldn't say instructions, I would say complaints, we received a number of complaints regarding the Two Guys from Harrison.

Mr. Sykes:

Q. And who were those complaints made by?

A. No. 1—

Mr. Duvall: Object to this.

Court: I don't think he has to tell anything about the source of information from which these things came, the complaints.

Mr. Sykes: I proffer to prove by the witness, if Your Honor please, that complaints came from certain business competitors.

Court: The essence of this isn't where complaints came, the essence of this is whether or not there's been any violations of a law, that's the long and the short of it. It doesn't make any difference whether it came by inspiration, declamation, oration, decimation or any other ation.

Mr. Sykes: I hope not dissipation. May I have a clear cut ruling?

Court: Sustained.

Mr. Sykes: And rejects the proffer?

Court: Yes.

Mr. Sykes:

Q. Now, Captain, what instructions did you give to the members of your department with regard to the enforcement of the Blue Laws on September 28th, after having received the complaints which you testified to?

Mr. Duvall: Objection.

Court: Overruled, you can answer, Officer.

Witness: After receiving the complaints the week following the opening of the Two Guys store, I had eight plain clothesmen report to headquarters on Sunday morning. I instructed these men to go out and make a survey of the [fol. 78] county and anyone that they found that was violating the Blue Law, to make a purchase and arrest the people immediately.

Mr. Sykes:

Q. How many arrests were made on that day?

A. I don't recall exactly, it was somewhere in the neighborhood of ten or eleven.

Q. That is ten or eleven total arrest or ten or eleven stores or institutions at which arrest were made?

A. I think it was about six business places near as I can recollect.

Q. And how many were made at the Two Guys from Harrison store?

A. I think there were seven.

Q. So a total of seven out of eleven or twelve arrests was made at the Two Guys from Harrison store?

A. That is correct.

Q. Now, after September 28th what instructions did you give to the department with regard to enforcement of the Sunday Blue Laws on subsequent Sundays?

Mr. Duvall: Objection.

Court: Overruled, you can answer it.

Witness: My instructions were the same, we certainly weren't picking on the Two Guys, we went out and arrested other people, I don't recall how many were arrested, but we did arrest other people, and from that time on, up to this present Sunday, there was two or three arrests each Sunday. Last Sunday there were a total of seven places, near as I can recall, that were brought in and charged with violating the Blue Laws:

Q. Are these subsequent arrests that have been made after September the 28th, arrests which were made on your own motion, or were they arrests which were the result of complaints?

Mr. Duvall: Objection.

[fol. 79] Court: Sustained, I don't think it makes any difference.

Mr. Sykes: Your witness.

Mr. Duvall: No questions.

Mr. Mundy: Call Sgt. Frye.

SGT. MAXWELL FRYE.

Q. Sgt., after you testified were you in the court room while Corporal Disney was testifying?

A. I was.

Mr. Duvall: Object on the basis that this is a leading question, this witness is called as Mr. Mundy's defense witness.

Court: Overruled, let him answer it, answer the question.

Witness: I was.

Mr. Mundy:

Q. Were you here during the entire time that he was testifying?

A. Yes sir, I was.

#### MOTION FOR MIS-TRIAL AND DENIAL THEREOF

Mr. Mundy: Well, I renew the motion for a mis-trial, Your Honor. I have no doubt it will be overruled.

Court: The only thing Court will say is, if counsel can show where the defense right has been jeopardized the Court will be glad to entertain it, in the absence of that it's going to overrule the motion.

Mr. Mundy:

Q. Possibly you haven't had an opportunity to get the list you referred to?

A. Yes, I have.

Q. You have it in your hand?

A. Yes sir.

Q. May we look at it? Sgt., this is the list that you referred to while you were testifying a moment ago?

A. That's correct.

Q. And it has, just for identification at the top the word Sunday?

A. That's correct.

[fol. 80] Q. And the end it has Article 27, Section 604?

A. That's correct.

Mr. Mundy: We offer that as Defense Exhibit.

(List marked Defendant's Exhibit A.)

Court: This is a copy of what, Article 27, Section 521, isn't it?

Mr. Mundy: Yes, it is, Your Honor.

Mr. Duvall: Do I understand, that the record now shows that this paper incorporates the language under the '51 Code section, which has now been re-numbered as 521? If the record doesn't show it I want to get the '51 Code to show it.

Court: That speaks for itself, and Court understands the charges are based on Section 521 of Article 27 as provided in the 1957 Code.

Mr. Duvall: That's right, but what the State is saying is, to avoid confusion in the record that's being made, can it be agreed that that paper is the language of what in the 1957 Code is Section 521.

Court: I just asked that question and they agreed with it, that this paper is the law which is now modified as Article 27, Section 521, I didn't understand there was any difference about that.

Mr. Mundy: We can't make the agreement because we haven't had an opportunity to verify it.

Court: It wouldn't make a bit of difference whether this man had listed a million and one things that said they could have been sold, if the law said he could sell them, fine; if the law says he couldn't sell them then no matter what you list it doesn't make any difference, that's the Court's job to determine in this case whether there has been a violation of the law, not what the officers have listed. If somebody says you can go out here and commit murder and you go ahead and do it, does that excuse you? These things are so obvious it's not necessary to take all our time for some of this.

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[fol. 81] EUGENE LOUIS HOPPER, a witness of lawful age being first duly sworn, deposes and says:

Direct examination.

Mr. Hubbard:

Q. Will you state your full name and address, please?

A. Eugene Louis Hopper, 416 N Street, S.E., Glen Burnie, Maryland.

Q. Were you employed on Sunday, September 28th, 1938, at Two Guys Store?

A. Yes sir.

Q. In Anne Arundel County?

A. Yes sir.

Q. Now, have you heard Sgt. Frye's testimony in this case?

A. Yes sir.

Q. Did you hear Sgt. Frye testify that you had wrapped or put in a bag a certain purchase he made in the store?

Mr. Duvall: Objection, Sgt. Frye didn't testify to that.

Court: I don't think that's accurate, he didn't say Mr. Hopper put anything in a bag, he said, Mr. Hopper aided him in the selection of whatever article or merchandise it was, staples, I believe, and the stapler.

Mr. Hubbard:

Q. All right, would you tell us just what occurred between you and Sgt. Frye?

A. Well, I was in the store standing by the cash register when Mr. Frye came in, he went over and looked around, I didn't particularly pay any attention to him, and finally he came back to the cashier and, I believe, he asked the cashier something about the staple gun and she said, "that gentleman there will help you," so I went over and assisted him, showed him only where the objects were, I did not pick any of them up, I did not wrap them in a bag or anything of that sort that he said.

Q. Anything else you want to add?

A. No, nothing else I can add.

Mr. Hubbard: Your witness.

[fol. 82] Cross examination.

Mr. Duvall:

Q. How long had you been employed at the Glen Burnie store?

A. For approximately three weeks.

Q. And what was your capacity there?

A. Salesman.

Q. Who employed you?

A. Handsheps Industry.

Q. Is that a corporation?

A. That's right.

Q. And the individual who actually hired you was Samuel Scheps?

A. No sir, George.

Q. George Scheps?

A. Yes sir.

Q. And in what area of the store were you assigned to function as a salesman?

A. No particular area, only at the hardware department.

Q. The hardware department?

A. Yes sir.

Q. Well, as a matter of physical location that's restricted to that particular area of the overall store, is it not?

A. Yes, I didn't understand what you said until after.

Q. So you were employed as a salesman in the hardware department?

A. Yes sir.

Q. And was so employed on Sunday, the 28th?

A. Yes sir.

Q. Thank you, that's all.

Court: Is the Court to understand that you were in charge of the hardware department or just a salesman there?

Witness: I was not in charge of the hardware department at the present time, I was a salesman.

Court: You don't mean at the present time, you mean at that time.

Witness: At that time.

Court: Who was the manager?

[fol. 83] Witness: Samuel Scheps.

Court: Court has no further questions.



PAUL KICEY, a witness of lawful age, being first duly sworn, deposes and says:

Direct examination.

Mr. Sykes:

Q: Your name and address, please?

A. Paul Kicey, currently staying at the Doll Motel in Glen Burnie.

Q: Are you employed at the Two Guys from Harrison store in Anne Arundel County?

A. Yes, I am, as manager of the store.

Q: You are the manager?

A. That's right, sir.

Q: What is Mr. Mayer's position?

A. Mr. Mayers is in charge of the major appliance section of the store.

Q: Were you present at the store on the day that the arrests in this case occurred, September 28th, 1958?

A. Yes, I was.

Q: Can you tell me, tell the Court, what the store's official sales policy is with regard to Sunday sales, what instructions are given to the employees?

Mr. Duvall: Objection, on the basis of the—

Court: It doesn't make any difference what instructions were given, gentlemen, it's a question of what happened. Court will let him answer it, it's just making that statement ahead of time.

Witness: We attempted to sell all merchandise which was, in our mind, legal under the current laws, especially that Article 509.

Mr. Sykes:

Q: Is there any merchandise which you withheld on Sundays?

A. Yes.

[fol. 84] Mr. Duvall: Objection.

Court: Court is going to give him latitude to try to present whatever they feel was within the realm of their de-

fense, realize that the violation of a technicality, so it will give them some latitude; if it were not before the Court Court's ruling would be strictly, what Court feels would be strictly rules of evidence.

Mr. Duvall: They have indicated they may proceed to the judicial state government, I want the record to be—

Court: As Court has indicated it doesn't make any difference, but it will let him answer the question.

Witness: Well, several weeks back Mr. Herbert Hubshman and I, that's the president of Two Guys, went through the store and selected items which we thought would not be permissible under the Article 509, among the articles selected not to be sold were major appliances, cabinets, woman's coats with fur on them or fur coats, man's overcoats, top coats, men's suits, pets, pet supplies, costume jewelry, and that, I believe, is about all.

Mr. Sykes:

Q. What is the range of merchandise which is carried by the Two Guys from Harrison store, how would you characterize the store?

A. Well, not trying to use our slogan and everything under the sun, it covers just about everything you could possibly use in all walks of life, in the home or in businesses, operation of businesses.

Q. Now, these departments that contain merchandise, which was not to be sold on Sunday, how did you notify the public of that fact?

A. Well, we had very large signs painted specifying what articles were supposedly available for sale under Article 509, in fact, we had Articles 509 printed and distributed and posted very prominently in the store, and we also put up smaller signs showing which items were not available for sale, certain sections of the section wanted we would rope off, the entire section where the items were located.

[fol. 85] Q. Now, do you have any of those signs with you?

A. We have one that I put against the wall, it's one of the large ones which shows the wording of Article 509.

Q. Would you produce it?

Mr. Sykes: I offer that in evidence.

Mr. Duvall: The State will object.

Court: Hold it up so we can see it. All right, Court will admit it for what its worth.

(Sign-marked Defendants' Exhibit B.)

Mr. Sykes:

Q. Was that sign and the other signs that you talked about posted in the store on September 28th, 1958?

A. Yes, they were, they were posted and we had several of these large ones posted very prominently throughout the building, the smaller signs were posted so that they'd be no question what~~o~~ever as to whether or not the sections which we were not selling in could not be missed by the public.

Q. Did you have any conversation with any of the officers who were in the store?

A. None that I can recall.

Mr. Sykes: No further questions.

Cross examination:

Mr. Duvall:

Q. How long have you been manager of the Glen Burnie Store?

A. Since its opening.

Q. When?

A. September 18th.

Q. And what is your home address?

A. 54 Magnolia Avenue, Jersey City.

Q. And postal zone?

A. 6.

Q. Now, you had responsibility for the overall operation of this store?

A. That's right, sir.

[fol. 86] Q. From September 18th until and including September 28th?

A. That's right.

Q. And have you been manager of the store since September 28th without interruption?

A. Without interruption, such as the days that I'm not working?

Q. No, whenever you're working.

A. Whenever I'm working, yes sir.

Q. What is included in the major appliance section to which you made reference?

A. That would include refrigerators, washing machines, freezers, stoves, large phonographs, hi fi equipment.

Q. Now, physically, where is that section located with reference to the portion of the store where the stapling gun and staples were sold?

A. Well, those are at opposite ends of the building.

Q. That would be how far away?

A. Oh, roughly, a hundred and twenty five, hundred and fifty feet.

Q. Were you present in the store on Sunday, the 28th, about 1:30, between 1:30 and 2?

A. I believe I was.

Q. Who would be in overall charge of the store in your absence?

A. Well, it would be several persons designated, I, officially do not have an assistant, and several persons would be delegated depending upon the day off, circumstances.

Court: When did you first become familiar with Section 509 of Article 27?

Witness: Oh, frankly, I'm not sure; Your Honor, it was several weeks back.

Court: Before September the 28th?

Witness: It might have been, I, frankly, wouldn't remember.

Court: And you knew there were certain articles that were not saleable on Sunday, didn't you?

[fol. 87]. Witness: That's right, sir.

Court: You're saying to the Court that you made up the list which you decided could be sold on Sundays and which you thought could not be sold on Sundays?

Witness: Well, as a result of having 509 in front of us—

Court: I mean, what you're saying is, if you were interpreting Section 509 according to how you viewed the situation in order to determine whether or not you could sell these articles and couldn't sell those articles?

Witness: That's right, sir.

Court: All right.

Mr. Duvall: I have nothing further.

Redirect examination.

Mr. Sykes:

Q. When you say there are several people that are designated as managers, you mean, anyone at one time in your absence?

A. That's right, anyone person.

Q. Is Mr. Mayers sometimes designated as manager in your absence?

A. Oh, yes.

Q. You testified, I think, that you may have been familiar with 509 before the 28th of September, and then you said that the signs were up on the 28th of September, and I ask you to think back and indicate approximately when you first became aware of 509 and who made you aware of it?

A. Well, now, with being reminded of that fact about the signs being printed only the day before September 28th, now, I would realize it must have been within a period of a few days or maybe a couple of days prior to September 28th, that Article 509, as such, became familiar to me.

Q. Did you have any consultations with the, or did the manager have any consultations with any counsel that [fol. 88] was preparing their list in making up their merchandise policy?

Mr. Duvall: Objection.

Court: Overruled.

Witness: Well, that I frankly would not know, I presume there was.

Court: If you don't know, don't make any presumption, either you did or you didn't.

Witness: Well, actually, I do not know.

Mr. Sykes: That's all.

Mr. Sykes: I'd like to re-call Captain Wade for a moment.

Sheriff: Captain Wade has gone back to the station.

Mr. Mundy: Your Honor, may we make a proffer, I want to save as much time as possible, it might be in view of your indication that you would consider his testimony inadmissible, but I'd like to make a proffer for the record.

We'd like to prove that on Sunday, September 26th, some investigators—

Court: Wait just a minute now, I thought Sunday was the 28th.

Mr. Mundy: What did I say, September, I'm sorry, Your Honor, October.

Court: October 26th?

Mr. Mundy: That on October 26th, I beg your pardon.

Court: This past Sunday?

Mr. Mundy: This past Sunday. Investigators employed by Two Guys caused certain shopping to be made at many locations and made purchases of articles that come within the prohibition of the Sunday law. Now, in support of that proffer, not as items admissible per se, but just to detail the proffer I should like to put in affidavits of the [fol. 89] persons who made these purchases, as I say, I'm, of course, aware that the affidavits—

Court: You mean made purchases at other places?

Mr. Mundy: At other places, yes, Your Honor.

Court: Well, how would that relate to the charges here on September the 28th?

Mr. Mundy: Well, as I said, Your Honor, in view of your ruling I thought probably you would consider it inadmissible, but I just want to make the proffer.

Court: Court doesn't see where it has any relevancy in the case, from what it's heard over the radio, there's been some subjects under arrest, but there hasn't been any subsequent trials in some of these cases. They're all after the date here, September the 28th.

Mr. Mundy: Well, may I have the affidavits marked as part of the proffer, Your Honor?

Court: Yes, they may be called on as witnesses probably for subsequent prosecution too, so you want to be sure that we have all these names here and use them as witnesses, make this thing more pronounced than what it is now. See, this is a two head sword.

Mr. Duvall: May it please the Court, the person whose signature appears on these affidavits—

Court: Excuse the Court just a minute. Court understands now, procedurally, that the defendant has proffered a number of sworn statements with sales slips relative to purchases that have been made by certain persons assuming they are representatives of Two Guys from Harrison, is that correct?

Mr. Mundy: The purchases were made, I think, by employees of a detective agency, Your Honor, and they're in court prepared to testify to these purchases.

Court: As to sales or purchases made since September 28th?

[fol. 90] Mr. Mundy: Yes, Your Honor, my examination, they were all made on last Sunday.

Court: And you're offering those as testimony in behalf of the defendant?

Mr. Mundy: Yes, I proffer the testimony of the witnesses themselves, and the affidavit is merely to show what that testimony would be.

Court: Well, the Court overrules the admissibility of those various statements, sworn statements or affidavits or whatever they may be designated as, because the Court feels they're irrelevant to the issues in this case. You have a right to proffer them and the recorder will so note as to each of these statements that you wish to present.

Mr. Mundy: And also you would reject the viva voce testimony of the witnesses who made the purchases?

Court: Any witnesses who would be presented in order to testify as to the substance of those respective affidavits or sales or purchases, are in the same category. Court will sustain the objection to their testimony and you can proffer the fact that you were ready, willing and able to present them to testify.

Mr. Mundy: That's our case, may it please the Court.

Court: Court will hear you, gentlemen.

Mr. Hubbard: Renewed motion for a directed verdict.

Court: Overruled.



## COURT'S REMARKS AND FINDING OF GUILT

Court: You have before us here a situation where on the statute books are certain laws including Section 521 of Article 27. There have been, we'll say in all fairness, an indifference of any definite effort strictly to enforce that law, but the Court is confronted with what is fundamental in cases of this kind, merely, the acquiescence in or by usage of them. There is a failure to enforce a law which [fol. 91] is on the statute books, and which when brought to the attention of those who may or may not have violated it and the enforcement of the authority is a valid law, and an effort made to enforce it. Court cannot say that because you have not in strict enforcement of that law, whether by habit or custom or whatever way we have gotten used to doing this, that and the other thing in our mode of living, that when the issue is presented the Court can't say to the citizens of the county we won't enforce that law, but we'll enforce another, we don't think that law ought to be enforced. Court hasn't the authority to do that, it cannot ignore what the law provides, whether it be a popular law or an unpopular law, if it is the law. In this case, Court has read Section 521 and re-read it, it has tried to find some other law that would perhaps put a different interpretation on it from what the first impression was, but it has been unable to find anything to support the position of the defendants in this case, based on the evidence presented. We're living in a complex age, things are moving at a rapid pace. In certain sections of our state and certain sections of the country you have still a puritanical approach to certain things that go on on Sunday; in other sections you have a more liberal approach, you might say, in the vernacular, this is an unpopular law, enforcing this law this way, we don't think it ought to be the law and you can criticize it in more ways than one. One comment of which we were all cognizance was mentioned this morning, that it seems to be ridiculous that you can buy beer and whiskey on Sunday and yet, unfortunately, if you had to attend a wedding or a reception or a dinner and opened up your bureau drawer and found out you didn't have an undershirt because maybe some mice had gotten in there and eaten up the last one you had and you had to run

around the corner and get one so you'd be dressed for the party or occasion, why, that's against the law now, and the Almighty is going to send you to eternal damnation because you go out and buy an undershirt under all the conditions. You see, habits of people have changed, what we call Blue Laws are perhaps in the estimation of some somewhat antiquated, they don't fit in with modern conditions, and maybe we don't agree with what those laws say today, but this is the wrong forum in which to get the change. That must come based on the will of the people which our democratic processes provides as to what is best for the majority of our people. If the will of the people of this county is that the doors be nailed tight and sealed against any sales of any kind on Sunday, if that's the desire of the people of this county they have a perfect right to register it through their legal representatives, legislative representatives in the halls of the General Assembly and have enacted into law in keeping with the democratic process, what is best for the people of our county.

If on the contrary they don't want the old approach to it, hell fire and brimstone added too as used to be in years gone by; want a more reasonable approach based on modification of the law, if such is desired, then they have a perfect right in that respect to ask their representatives in the General Assembly to enact laws in keeping with what the majority of our people feel is for their best interest. No matter what kind of law you enact in this respect, this issue, it will not be satisfactory in everything concerned, but no law, generally speaking, meets with the approval of everybody, and the most important one the Court can think of is the income tax law.

In this case you have a statute that says expressly what you may be able to sell on Sunday, it enumerates those articles and there is very little room for interpretation, newspapers, plain words, periodicals cover a number of magazines, and things of that kind, tobacco, cigars, cigarettes, candies, nuts, ice cream, soft drinks, sodas and things of that kind are all set forth there. Those are the things which the law says are legal to sell on Sunday; it doesn't say you can sell a trowel on Sunday, it doesn't say you can sell a can of coffee on Sunday, it doesn't say you

can sell a stapler or staples on Sunday, there's no room for stretching it to include that, no term used there that would include these items that these warrants relate to. The Court in interpreting that section has conceived what that law means, and the meaning and the words of the [fol. 93] statute, and the words in this case it can't find anything to justify the violations which these warrants say have been done, the items are enumerated.

Simoniz floor wax, for instance, now, you say what harm is there in selling that on Sunday, whose going to be hurt by it, but that isn't the question, it isn't a question of what's good and what bad is done by the violations charged here, it is simply a charge brought by the State through its proper officials in the enforcement of a statute which may or may not be a popular law in Anne Arundel County. It is manifest from the attendance here today, and from a number of things that have been said, that there is some desire for a change whether it be for the better or for the worse, depending on whether you're a strict constructionist or whether you're modest in your approach to this problem.

Court has the unpleasant duty in this case of having to place persons, who, the Court feels, despite these charges are in the category of respectable citizens in our county, and that they are the victims of an enforcement of the law which has heretofore been lightly regarded, more or less indifferently concerned with, and has not strictly been enforced. And if you'll read that section, as I'm sure you've done, it has in its provision as a penalty a latitude of punishment because of this very kind of situation, namely, acquiescence in a course of conduct in the mode of living and then suddenly something happens which requires an enforcement of the law. And when the law is enforced then those who are unfortunately caught in that strict enforcement become the victims of a penalty provided in the statute. The first offense is a mild offense, but as the offenses are repeated therein lies the difficulty because the second offense provides not simply the penalty in so far as payment of a fine is concerned, but confinement in jail of ten to thirty days, the maximum fine of Five Hundred Dollars (\$500.00) plus the all important thing that the Judge has a right to declare the license null and

void, and then when you step it up to a repetition of it the offense begins to double after the second offense, the loss of license for twelve months after the second offense, two years after that, so you see the drafters of that law had in [fol. 94] mind at that time kindness, if you want to call it that, in the first offense, but a stricter enforcement once you have become the victim of violating that law, and that's unfortunately the position in which these parties find themselves today. The Court can well understand why you want to postpone this case, if they're never tried you never have a first offense from which to start from that time on, but after the first offense is when this thing gets to be serious and that's why the Court says in all fairness to every person here, if this law is not desired and the wishes of our county, then let them take the initiative and demand that a law be drafted and enacted in keeping with the wishes of the majority of the people of our county in accordance with our democratic way of life. If they desire, the people of this county, Court has said, feel that they don't want to sell any merchandise on Sunday, that it should be strictly a Blue Law county, no more no less, then the people have a right to go to the members of the legislature, both the State Senate and House of Representatives, House of Delegates, and ask, insist upon that there be a strict Sunday enforcement, no sales of beer, whiskey, newspapers, magazines, tobacco, cigars, cigarettes, gasoline, greases, oil, none of that.

On the other hand, because of our so-called advance in civilization people in this day and time find out that we have an integrated society, people work on Sundays now by virtue of the economic pressure who never thought of working in years gone by and it's necessary to do this, that or the other thing to make a livelihood, but sometimes what you do on Sunday in so far as trying to make a living and make a success of his life, that day stands between your success and failure, if the pressure is such that meets the present needs and it is necessary that a man discharge his religious obligation in the morning on Sunday and is free to recreate as he desires whether it's football, baseball, skating, swimming or whatever recreation it may be, or buying garden trowel because he likes to garden and the

only one he has to do it is Sunday afternoon, if that's the will of the majority of the people then have the law to support them.

[fol. 95] It's a sad duty of this Court to perform, to say that it has to place these unfortunate people by virtue of this law as it now exists in the category of those who have committed a misdemeanor, enter a finding of guilty as to each traverser.

Any reason why the Court shouldn't pass sentence?

Mr. Mundy: Your Honor, no, we are prepared.

Court: Will the various ladies and gentlemen please stand up?

Court: This is a rather painful duty that the Court has to perform, and want to say that to you ladies and gentlemen, because it doesn't feel that you are criminals in the sense in which we live with it here week in and week out. You've been the unfortunate victims of what the Court feels is an over zealous attitude in trying to go out here and do business without discretion, based on the existing law, but you, unfortunately, have been party to this perhaps because you've been required to earn a livelihood, nothing more, nothing less, not that you desired or intended to wilfully violate the law, and it's because of that that Court is doing with this thing what it feels or hopes is a kindly disposition of it.

No. 4263, that's Margaret Mary McGowan, the judgment and sentence of the Court is, you pay a fine of Five Dollars (\$5.00) and cost, and be confined to the County Jail until fine and cost are paid. The same fine as to each of the other traversers.

Now, let me say, finally, that the mere fact that the Court has made what it feels is a nominal fine is only conclusive as to this first offense. The Court is frank to state, as to each and everyone of you, if there is a second offense brought into this Court and tried, whether it be before the Court or the Jury, and there is a conviction the Court will then feel bound as long as this lies on the statute books to give you the maximum penalty.

Mr. Mundy: I have just one thing I'd like to call your Honor's attention to.

[fol. 96] Court: What is it?

Mr. Mundy: First of all, so it doesn't slip my mind, may I thank you for your courtesy you've extended during the course of the trial.

Court: Well, I don't know whether the Court has been as courteous as it would like to be, it's got its hands tied to a certain extent.

Mr. Mundy: As to the payment of the fine, there's no inclination not to pay the fine, but there's some little doubt in our mind as to whether the payment of the fine might prejudice our right to appeal.

Court: I don't think it has anything to do with the case on appeal whether you pay your fine or not, if you don't pay the fine Court will have to enact some security for the payment of your fine and perhaps the covering of costs and incidental items.

Mr. Mundy: That would be maybe a bond or some cash?

Court: That's right. If counsel wishes to discuss it among yourselves before you say whether or not you'll pay the fine, why, we're not going to put the sheriff on these people and hound them or anything of that kind, they're just simply standing by waiting for your advice in the matter.

Mr. Mundy: Thank you very much, Your Honor.

[fol. 94]

IN THE COURT OF APPEALS OF THE STATE OF MARYLAND

OPINION—May 14, 1959

Seven persons, convicted of making sales of merchandise forbidden on Sunday in Anne Arundel County, argue in their appeal that the trial court committed reversible error (1) in refusing to remove or postpone their trials; (2) in denying motions to dismiss the prosecutions based on the claims the Sunday Blue Law is unconstitutional (a) as violating the right of religious freedom guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, (b) as discriminating arbitrarily in favor of certain sales and against others, and (c) as being vague and indefinite, all contrary to the Fourteenth Amendment and Articles 19 and 23 of the Maryland Declaration of



Rights; and (3) in refusing to direct verdicts as to some of the accuseds after the evidence was in.

Code (1957) Art. 27, deals with "Sabbath Breaking" in Sections 492 and 534. Section 492 prohibits "bodily labor" on Sunday throughout the State, "works of necessity and charity always excepted," as well as any "unlawful pastime or recreation." Section 521 prohibits throughout the State the sale, barter or gift on Sunday of any merchandise except tobacco, cigars, cigarettes, candy, sodas and soft drinks, ice cream, and other confectionery, milk, bread, fruits, gasoline, oil and greases, drugs, medicines and patent medicine [fol. 95], cines, and newspapers and periodicals. Section 522, also State-wide in operation, makes it unlawful to keep open or use on Sunday any "dancing saloon, opera house, tenpin alley, barber saloon or ball alley." Section 509 repeals pro tanto Sections 492, 521 and 522 in Anne Arundel County insofar as they prohibit there the operating of, or working at, any "bathing beach, bathhouse, amusement park, dancing saloon", and permits in the County on Sunday the "sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses, at retail, picnic groves, amusements, games, amusement rides; amusement devices, entertainments, shows . . ."

For some time before September 1958 the Sunday laws had not been enforced regularly or vigorously in Anne Arundel County. Then, because of complaints that a newly opened branch of an interstate chain of stores was flouting the law to a degree exceeding that considered reasonable by competitors, the Anne Arundel County police began and continued an extensive and non-discriminatory crackdown on forbidden Sunday sales. The appellants, all employees of the new store, were arrested for, and charged with, selling merchandise on Sunday in violation of Section 521.

Counsel for appellants, retained the day before the trial, asked Judge Michaelson in chambers on the morning of the trial for a postponement or removal of the trial. They [fol. 96] were told the motions would not be granted but that they would have to be made and denied in open court. Then, in the courtroom in which the jury panel was seated,



appellants requested removal of their trials from the Circuit because "there has been considerable agitation concerning these so-called Sunday Laws in this County", said they did not have the necessary affidavits prepared, and asked for a ruling on the motion as if the formalities had been complied with, and leave to file the motion and supporting newspaper clippings to show the prevailing sentiment of the community. Leave was granted for the late filing of the motion and supporting data, and the removal was denied. The motion to postpone the case because of the late employment of counsel also was denied. As to this the court said that some twenty-six days earlier he had told counsel then representing appellants that there would be no postponement and that the litigants could not now complain fairly of lack of time to make full and proper defense. The court went on to say that, from what he had been told by prior counsel for appellants, the litigants "went from one lawyer to another and then finally to you gentlemen, who represent them today, primarily for the purpose of getting these cases postponed . . . and . . . that such tactics should not be sanctioned or approved by the Court, consequently, much as it regrets to do it, it will have to overrule the motion for a postponement."

The appellants say it was an abuse of discretion for the trial judge not to grant either the motion for removal or [fol. 97] the motion for postponement because, after he made the remarks he did in the presence of the prospective jurors, who were seated in the courtroom, they had to take a court trial or be tried by a prejudiced jury. We find no prejudicial error. It would appear from the record that the court had told counsel in chambers that he would deny both the removal and the postponement and that counsel, before they entered the courtroom, had decided to have the cases tried by the court because of the refusal to remove the case, not because of the refusal to postpone the trials, and not because of the court's remarks in the presence of the jury.

A new panel of jurors was not requested, which could have been done if a jury trial had been wanted, because of what had been said by the court. In any event, the remarks of the court as to the reasons for refusing a postponement cannot reasonably be expected to have had the effect the appellants

seek to give them. They were no more than revelations of knowledge the judge had obtained officially from agents of the appellants during the progress of the case, and there is no reason to suppose that a jury chosen from the panel seated in the courtroom would have been influenced as to the guilt or innocence of the appellants by hearing the judge temperately say that they had attempted to postpone their trials.

There is no indication in the record that community sentiment was aroused or adverse to Sunday sales or the appellants. If anything, the newspaper accounts of the new [fol. 98] police enforcement of the Sunday laws were more sympathetic to the position of appellants than otherwise.

It is settled that refusal to remove a non-capital criminal case is not subject to review by this Court except upon a showing of abuse of discretion. *Piracci v. State*, 207 Md. 499, 508-509. We find no such abuse in Judge Michaelson's refusal to remove or postpone the case.

The appellants' argument that the Sunday Blue Laws are unconstitutional as violating the right of religious freedom has been answered many times by this and other courts, which have held that the basic purpose of such statutes, with their exceptions, is the civil establishment and regulation of a day of rest from work, not a law respecting the establishment of religion or prohibiting the free exercise thereof, and that the statutes do not offend the First and Fourteenth Amendments to the Constitution of the United States. *Judefind v. State*, 78 Md. 510; *Levering v. Park Commissioners*, 134 Md. 48; *People v. Friedman* (N.Y.), 96 N. E. 2d 184, 186, and cases cited therein (appeal dismissed for want of a substantial federal question, 341 U.S. 907). We have been shown no reason why we should depart from these holdings.

The argument of unconstitutionality on the ground of discrimination likewise has been answered before by the cases. The legislative plan is plain. It is to compel a day of rest from work, permitting only activities which are [fol. 99] necessary or recreational. There can be, and often are, sharp differences of opinion as to what is necessary

and what is proper or preferred recreation, but the answers must be given by the legislature, and if they are not clearly arbitrary or oppressively discriminatory, the legislative choices must be sustained. In *Ness v. Baltimore*, 162 Md. 529, 538, Chief Judge Bond, in upholding the Baltimore City ordinance permitting specified amusements, games and sports on Sunday afternoons and permitting certain retail sales on Sunday, said for the Court (in reference to alleged discriminations in the statute): "But what is tolerable and what intolerable in Sunday observance seems to be a question which cannot be fully answered by a process of reason. It is to a large extent determined by the public conceptions of proper respect for the day, and these conceptions are the outcome of public sensibilities not based entirely upon any process of reasoning. Regulations to conform to the public conceptions can, perhaps, be less easily shaped by logical reason than almost any other governmental regulations. The constitutional prohibitions stand ready to prevent a clearly arbitrary and oppressive discrimination. . . . But the mere fact of inequality is not enough to invalidate a law, and the legislative body must be allowed a wide field of choice in determining what shall come within the class of permitted activities and what shall be excluded." See, too, *Brown v. State*, 177 Md. 321, and *People v. Friedman*, *supra*.

[fol. 100] Appellants say that the Anne Arundel exceptions to the state-wide law go beyond those sanctioned in the *Ness* case because they permit the operation of bathhouses, bathing beaches, amusement parks and related facilities, and the sale of articles customarily sold at, or incidental to the operation of, these facilities, as well as the sale of alcoholic beverages, and the operation of slot machines, pinball machines, and bingo games.

What is permitted all comes within the category of recreation, long recognized as a permissible Sunday activity. That we might think more appropriate or wholesome forms of recreation could have been chosen by the Legislature is of no moment, if those that were (presumably as reflecting the prevailing sentiment of the community), are not arbitrarily discriminatory or oppressive. We find the arguments of appellants on this point no more than the claim that the

statutes are unwise, and, if they are right, this of itself does not make the law invalid.

We come to the contention that the Anne Arundel County Sunday law is unconstitutionally vague because no merchant can know whether or not the article he sells on that day is a novelty, souvenir, accessory or piece of merchandise "essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, bathhouses, amusement parks or dancing saloons. This argument is made on the premise that Sec. 509 broadens the exceptions of Sec. 521 throughout Anne Arundel County so that anything "customarily sold at" a bathing beach, bathhouse, amusement [fol. 101] park or dancing saloon can be sold on Sunday anywhere in the County. It may well be that the legislative intent in Sec. 509 was to permit the use and enjoyment by the public on Sunday of the specified places of recreation and to insure that enjoyment by allowing patrons to buy, on the spot, what they customarily could buy to use the facilities to the fullest. We need not decide whether sales were intended to be limited to the places of amusement specifically allowed to operate on Sunday. If we assume, as do the appellants, that the language of Sec. 509 is broad enough to permit sales anywhere in the County, we do not find Sec. 521, as so broadened by Sec. 509, unconstitutionally vague.

A criminal statute must be sufficiently explicit to enable a person of ordinary intelligence to ascertain with a fair degree of precision what it prohibits and what conduct on his part will render him liable to its penalties; or it will affront the constitutional guarantees of due process. But such a statute is not void for indefiniteness merely because it exacts the burden of rightly estimating a matter of degree, or because juries may differ in their judgments in cases brought under it on the same state of facts. *State v. Magaha*, 182 Md. 122, 125. See also *Ruark v. Engineers' Union*, 157 Md. 576, 583, *et seq.*, and *Glickfeld v. State*, 203 Md. 400, 404. Section 509 clearly informs those who read it as to the type of articles that may be sold on Sunday in Anne Arundel County. We think that a person of ordinary intelligence could know with a fair degree of precision what [fol. 102] he could or could not sell.

As the Supreme Court has noted, a statute is not to be condemned because there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls. *United States v. Petrillo*, 332 U.S. 1, 7, 91 L.Ed. 1877 (there the statute, upheld against the defense of unconstitutional vagueness, made it a criminal offense to coerce a radio broadcaster to employ or agree to employ, any persons in excess of the number needed to perform actual services). In *Boyce Motor Lines v. United States*, 342 U.S. 337, 339, 340, 96 L.Ed. 367, 370, 371, there was involved the regulation of the Interstate Commerce Commission, authorized by 18 U.S.C. Sec. 835, that required a driver of an interstate motor vehicle, transporting explosive or inflammable substances, to avoid "so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." The Supreme Court said, treating the regulation as a criminal statute: "... no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." In *Sproles v. Binford*, 286 U.S. 374, 393, 76 L.Ed. 1167, 1182, the words in a criminal statute "shortest practicable route" were held not too vague to be unconstitutional.

[fol. 103] The court should have directed verdicts for them say five of the appellants. One sold a toy submarine and four sold staplers. It is argued that the submarine is "merchandise" and the staplers "accessories" that are "customarily sold at" a bathing beach. There was no error in refusing to direct the verdicts. It is not so clear that these articles are customarily sold at a bathing beach that the court could so rule as a matter of law. It was for the trier of fact to decide whether the submarine and the stapler had been excepted by the statute or not. *Callan v. State*, 156 Md. 459, 466, 467. There the accused was convicted of running an "opera house" on Sunday. He claimed reversible error in the refusal of the trial court to permit him to produce a witness to testify "as to what is an opera house" in

support of his contention that his business, that of showing motion pictures, was not within the meaning of that term. This Court rejected that contention on the ground that what constituted an opera house was a question to be decided by the jury on the basis of "ordinary experience."

The judgments will be affirmed.

Judgments Affirmed, With Costs.

[fol. 104]

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IN THE COURT OF APPEALS OF MARYLAND

No. 237

September Term, 1958

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MARGARET M. McGOWAN, et al.

—v.—

STATE OF MARYLAND

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BRUNE, C.J.  
HENDERSON,  
HAMMOND,  
HORNEY,  
JJ.

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OPINION BY HAMMOND, J.

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Filed: May 14, 1959



[fol. 105]

IN COURT OF APPEALS OF MARYLAND  
No. 237, September Term, 1958

MARGARET M. McGOWAN et al.

—v.—

STATE OF MARYLAND

Appeal from the Circuit Court for Anne Arundel Co.  
Filed: January 9, 1959

May 14, 1959, Judgments affirmed, with costs. Op. Hammond, J.

MANDATE

Statement of Costs:

Record	\$ 24.00
Steno. costs	290.00
Filing Record on Appeal .....	\$ 20.00
Printing Brief for Appellant .....	634.27
Appearance Fee—Appellant .....	10.00
Printing Brief for Appellee .....	111.50
Appearance Fee—Appellee .....	10.00

State of Maryland, Set:

I do hereby certify that the foregoing is truly taken from the record and proceedings of the said Court of Appeals.

In testimony whereof, I have hereunto set my  
(Seal) hand as Clerk and affixed the seal of the Court  
of Appeals, this fifteenth day of June A. D. 1959  
109 J. Lloyd Young, Clerk of the Court of Appeals  
of Maryland.

Costs shown on this Mandate are to be settled between  
counsel and Not Through This Office

[fol. 106] Clerk's Certificate to foregoing transcript  
(omitted in printing).



[fol. 107]

## IN THE COURT OF APPEALS OF MARYLAND

September Term, 1958

No. 237

MARGARET M. MCGOWAN, et al., Appellants,

—v.—

STATE OF MARYLAND, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed August 3, 1959

I. Notice is hereby given that Margaret M. McGowan, Nina Lee Shiflet, Herbert Mayers, Eugene L. Hopper, Samuel Schepps, Betty R. Sawyer, and Dora M. Joswiak, the Appellants in the above-entitled cause, hereby appeal to the Supreme Court of the United States from the final order of the Court of Appeals of Maryland affirming the judgment of conviction by the Circuit Court of Anne Arundel County on October 28, 1958, entered herein on May 14, 1959.

This appeal is taken pursuant to 28 U.S.C., sec. 1257.

Appellants were convicted of the crime of making sales on Sunday, September 28, 1958, in violation of Section 521 of Article 27 of the Maryland Code prohibiting the sale of merchandise, with certain exceptions, on Sunday and fined Five Dollars (\$5.00) and costs.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the following:

- a. Docket entries and judgment and exhibits
- b. Testimony in open Court before Hon. Benjamin Michaelson

e. Court's remarks

d. Opinion by the Court of Appeals of Maryland

[fol. 108] III. The following questions are presented by this appeal:

a. Whether the Sunday Blue Laws applicable to Anne Arundel County are unconstitutional in that

1. They contravene the 14th Amendment to the Constitution of the United States and Articles 19 and 23 of the Maryland Declaration of Rights because they embody arbitrary and capricious classifications which unlawfully discriminate in favor of certain sales and others,
2. The legislature in its enactment of the law has deprived citizens of one part of the State of rights and privileges which they enjoy in common with the citizens of all other parts of the State constituting classification legislation for Anne Arundel County making certain Sunday sales a crime,
3. They are arbitrarily discriminatory and so vague as to fail to give reasonable notice of the conduct intended to be prohibited thereby,
4. The Maryland Sunday Blue Laws applicable to Anne Arundel County violate the guarantee of freedom of religion contained in the 1st and 14th Amendments of the Constitution of the United States.

Harry Silbert, A. Jerome Diener, Sidney Schlachman,  
Silbert, Gomborov & Diener, 200 Equitable Building,  
Baltimore 2, Maryland, Lexington 9-2711.  
Attorneys for Appellants.

[fol. 109] Proof of Service (omitted in printing).

[fol. 110]

## SUPREME COURT OF THE UNITED STATES

No. 438—October Term, 1959

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MARGARET M. McGOWAN, et al., Appellants,

— v. —

MARYLAND.

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## ORDER NOTING PROBABLE JURISDICTION—April 25, 1960

Appeal from the Court of Appeals of the State of Maryland.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary calendar and set for argument immediately following No. 532.

April 25, 1960

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IN THE  
**Supreme Court of the United States**

No. \_\_\_\_\_

MARGARET M. MCGOWAN, ET AL.,

Appellants,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF MARYLAND

**JURISDICTIONAL STATEMENT**

Appellants appeal from the mandate of the Court of Appeals of Maryland No. 237, September Term, 1958, filed May 14, 1959, in the case of *Margaret M. McGowan, et al. v. State of Maryland*, 151 A. 2d 156, affirming convictions by the Circuit Court for Anne Arundel County on October 23, 1938, in seven Sunday "Blue Laws" cases, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

**OPINION BELOW**

The opinion of the Court of Appeals of Maryland is reported in 151 A. 2d 156. Copy of the opinion is attached hereto as Appendix B.



## JURISDICTION

This suit was brought under 28 U.S.C. Sec. 1257(2) to reverse the Court of Appeals, the highest Court of the State of Maryland, whose mandate was filed May 14, 1959, and notice of Appeal was filed in that Court on August 3, 1959. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Section 1257(2). The Statute referred to here is not the same as the Statute pursuant to which the case was brought referred to above.

The cases believed to sustain the Court's jurisdiction are: *Largent v. Texas*, 318 U.S. 418; *Martin v. Hunter's Lessee*, 14 U.S. 304, 1 Wheat. 304, 4 L. Ed. 97; *Cohens v. State of Virginia*, 19 U.S. 264, 6 Wheat. 264; *Brunderhoff Faris Trust and Savings Co. v. Hill*, 50 S. Ct. 451, 281 U.S. 673.

## QUESTIONS PRESENTED

Whether the Sunday Blue Laws applicable to Anne Arundel County are unconstitutional in that

I. They contravene the 14th Amendment to the Constitution of the United States and Articles 19 and 22 of the Maryland Declaration of Rights because they embody arbitrary and capricious classifications which unlawfully discriminate in favor of certain sales and against others.

II. The legislature in its enactment of the law has deprived citizens of one part of the State of rights and privileges which they enjoy in common with the citizens of all other parts of the State constituting classification legislation for Anne Arundel County making certain Sunday Sales a crime.

III. They are arbitrarily discriminatory and so vague as to fail to give reasonable notice of the conduct intended to be prohibited thereby.

IV. The Maryland Sunday Blue Laws applicable to Anne Arundel County violate the guarantee of freedom of religion contained in the 1st and 14th Amendments of the Constitution of the United States.

### STATUTES INVOLVED

Art. 27, sec. 492.

Art. 27, sec. 521.

Art. 27, sec. 522.

Art. 27, sec. 509.

Art. 2B, sec. 28(a).

Note on other pertinent sections of Art. 2B.

Code of Public Local Laws of Anne Arundel County  
Flack, 1947, secs. 384, 385.

Resolutions of County Commissioners of Anne Arundel County:

March 11, 1952.

Oct. 7, 1953.

Article 19, Constitution of Md.

Article 23, Constitution of Md.

### STATEMENT OF THE CASE

These appeals are from convictions by the Circuit Court of Anne Arundel County on October 28, 1950, in seven Sunday "Blue Laws" cases which were consolidated and tried before the Court without a jury.

The Appellants, who were fined \$5.00 and costs, were employees of a company known as "Two Guys from Harrison" which, about ten days before the arrests made in these cases, opened a general merchandising store on Ritchie Highway in the Glen Burnie area of Anne Arundel County. The Appellants were convicted of making sales on Sunday, September 28, 1958 in violation of Section 521 of Article 27 of the Maryland Code, which prohibits the sale of merchandise, with certain stated exceptions, on Sunday. The Appellants, McGowan and Jozwiak, were convicted of selling a three-ring loose-leaf binder and a can of simoniz floor wax. The Appellants, Hopper, Shiflett, Schepps and Mayers were convicted of selling a stapler and staples. The Appellant Sawyer was convicted of selling a toy submarine.

Judge Benjamin Michaelson pointed out in deciding the case:

"One comment of which we were all-cognizance was mentioned this morning, that it seems to be ridiculous that you can buy beer and whiskey on Sunday and yet, unfortunately, if you had to attend a wedding or a reception or a dinner and opened up your bureau drawer and found out you didn't have an undershirt because maybe some mice had gotten in there and eaten up the last one you had and you had to run around the corner and get one so you'd be dressed for the party or occasion, why, that's against the law now, and the Almighty is going to send you to eternal damnation because you go out and buy an undershirt under all the conditions. You see, habits of people have changed, what we call Blue Laws are perhaps in the estimation of some somewhat antiquated, they don't fit in with modern conditions, and maybe we don't agree with what those laws say today, but this is the wrong forum in which to get the change."

In passing sentence, the Court said:

"Court has the unpleasant duty in this case of having to place persons, who, the Court feels, despite these charges are in the category of respectable citizens in our county, and that they are the victims of an enforcement of the law which has heretofore been lightly regarded, more or less indifferently concerned with, and has not strictly been enforced. And if you'll read that section, as I'm sure you've done, it has in its provision as a penalty a latitude of punishment because of this very kind of situation, namely, acquiescence in a course of conduct, in the mode of living and then suddenly something happens which requires an enforcement of the law. And when the law is enforced then those who are unfortunately caught in that strict enforcement become the victims of a penalty provided in the statute."

#### *How the Federal Question is Presented*

The constitutionality of the Maryland Sunday Blue Laws were raised in the course of the trial before Judge Michaelson in Circuit Court for Anne Arundel County by Melvin J. Sikes, Esq. (E. 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 Appendix to Appellants' brief). The following questions, substantially the same were raised in the Maryland Court of Appeals.

I. The Sunday Blue Laws applicable to Anne Arundel County are unconstitutional in that they contravene the fourteenth amendment to the Constitution of the United States and Articles 19 and 23 of the Maryland Declaration of Rights because they are arbitrarily discriminatory and so vague as to fail to give reasonable notice of the conduct intended to be prohibited thereby.

II. The Anne Arundel Blue Laws embody arbitrary and capricious classifications which unlawfully discriminate in

favor of certain sales and against others; and the pattern of Sunday legislation in Anne Arundel County has been so eroded by arbitrary special exceptions that the legislation no longer bears any reasonable relation to the public health, welfare, safety or morals.

III. The Sunday Blue Laws applicable to Sunday sales in Anne Arundel County are constitutionally vague.

IV. The Maryland Sunday Blue Laws applicable to Anne Arundel County violate the guarantees of freedom of religion contained in the 1st and 14th Amendment of Constitution of the United States.

"(Mr. Sykes). May it please the Court, in making this constitutional argument, I don't mean to waive our motion for postponement or other points, I'm just doing the best I can under the conditions we have, but I think it's instructive in this case to give Your Honor the general background of these statutes, specific statutes I'm going to raise. In the beginning we had one Sabbath breaking law, that was Section 492, that prohibited doing work or bodily labor on Sunday except for works of necessity and charity. The Court of Appeals in another day, in the Levering case, as the State's Attorney has indicated, sustained that; sustained it on the theory that the State has an interest in making sure that its citizens rest at least one day a week; that reasoning is entirely inapplicable to the laws that exist today.

(Court) Well, now, you better be careful and choose your words consistent with what you mean, if you're talking now civilly now, that's one thing, if you're talking now from the religious side of it you may have—

(Mr. Sykes). I'm talking from the point of view, the way these laws have finally shaped up they don't secure any interest in having anybody rest on one day a week because what happened after the Section 492 was construed and upheld by the Court of Appeals was this, as Your Honor knows, there was a succession of approaches to the legislature on behalf of specific busi-

7  
ness interest and localities, and exception after exception was carved out of this general statute. You have certain sport exhibitions allowed, you have motion pictures allowed—

(Court) Skating rink, bowling alley, and all the others, football, baseball.

(Mr. Sykes) Right, then you have general alcoholic beverage law, which permits the sale of beer on Sunday, which is a much more degrading thing than the sale of a cement trowel to putter around in your private garden on Sunday. Now, in addition to that, there is a special law in Anne Arundel County which applies to motion picture theatres, and there is Section 509, which I'll comment on in a minute, finally, there was a Section 521 under which the indictments are laid here, I mean, under which the warrants are laid here, in which there are several exceptions, even to the sales provision. Now, the sale provision prohibits sale in terms, but then it allows retailers to sell tobacco, cigars, cigarettes and candy and soft drinks, ice cream, milk, bread, fruit, gasoline, oils and greases, it's all right to have people travel up and down on Sunday and not stay home and work, it also doesn't apply to apothecaries, and it doesn't apply to newspapers and periodicals. In addition to that, finally, the bathing beaches and amusement parks sought an exemption for themselves, but they went further than that. Your Honor, and I'm not sure that Your Honor has completely understood the gist of our argument on this point, Section 521 on its face prohibits the sale of certain articles, we say, that on its face it is a discrimination in favor of what it permits to be sold, and a discrimination against what it refuses.

(Court) Isn't this the same argument that applies so frequently to local option and the sale of intoxicating beverages and different license fees that prevail in different various sections of this county?

(Mr. Sykes) No sir.

(Court) Some sections tax cigarettes and others don't tax cigarettes and so forth and so on.



(Mr. Sykes) No sir, 521 is a state wide statute on its face, and 521 as modified by 509 applies in Anne Arundel County and applies uniformly, geographically in Anne Arundel County.

(Court) That wasn't done by Anne Arundel County, that was done by the state's general assembly.

(Mr. Sykes) I know, but we have to ask ourselves—

(Court) It's not like, for instance, you attempt to have baseball in Baltimore some years ago and the City Council passed an ordinance and allowed the playing of baseball and then it was found invalid. You have to figure the source from which this legislation comes.

(Mr. Sykes) What I'm saying is this, Your Honor, this legislation comes while; it comes from the legislation it applies to Anne Arundel County, but you have to take the legislation as a whole, and you have to try to square it with the constitutional requirements for legislation. If the legislature, for example, had passed a law saying that every person in Anne Arundel County who has red hair is liable to immediate imprisonment for ten days, obviously, that kind of law can't stand because it's an arbitrary and capricious law on its face, it's not a reasonable classification. Now, look at what they have done here, and this is the important thing about this, Section 521 prohibits certain sales, Section 509 says, as far as Anne Arundel County is concerned the prohibition of these sales made by 521 has to be modified, and Section 492, 521 and 522 of this Article are repealed, in so far as—

(Court) Now, in so far as what?

(Mr. Sykes) In so far as they prohibit operating bathing beaches, that's not our case.

(Court) What's the next thing?

(Mr. Sykes) In so far as, they prohibit amusement parks and dancing saloons, that's not our case. I can pass over the question of whether it's an arbitrary discrimination to permit a dancing saloon and not to permit us to sell a cement trowel.



(Court) Put a peg right there for a minute — in so far as the niceties of these various situations are concerned, if you approach this from the violation of the Sunday law, what is there that strikes you more forcibly than the fact that the Court of Appeals has said, that the sale of whiskey and beer on Sunday is valid, where would you get a more specific declaration as to what may be permitted on Sunday.

(Mr. Sykes) What the Court of Appeals was saying was—

(Court) Article 2B superseded.

(Mr. Sykes) Yes, the sale of whiskey and beer was valid, but we now have the question, if the statute authorizes the sale of beer and whiskey, can it forbid the sale of a cement trowel on a reasonable basis?

(Court) What you're trying to say to the Court is, is that the equity of the situation ought to be that if you can sell whiskey and beer on Sunday, why can't you sell some of these less harmful or less destructive, less demoralizing items or articles, but this Court doesn't make the law, this Court doesn't legislate.

(Mr. Sykes) But the Court enforces the prosecution, if Your Honor pleases, that the laws be reasonable and not arbitrary.

(Court) Yes, but when we have a law that is, as far as we can determine, that presumably is a valid law, until it's declared to be otherwise, and that's this Court's function.

(Mr. Sykes) Your Honor is the Court and the question is before you.

(Court). But the Court cannot determine what laws shall be enforced and what laws shall not be enforced, that's not the Court's province.

(Mr. Sykes) Your Honor, may I say on that point, just this and then I will leave. This Court has no power, as Your Honor has said, to decide whether a statute passed within constitutional limits is wise or not, but becomes a point when a statute, as Your Honor mentioned in a discussion in the chambers, on its face makes

distinctions which are ridiculous, and when that occurs the statute is arbitrary and passes the constitutional limits and the Court must strike it down because it sustains statutes passed and the exercise of the police power only when they are not arbitrary and unreasonable. I can't say any more than that.

(Court) Court didn't use the word arbitrary.

(Mr. Sykes) Court used the word ridiculous.

(Court) Ridiculous, that's right, and it commented on it right now. The Court's personal opinion sometimes is not what the law says it ought to be. Court's personal views sometimes are entirely different in what it has to decide, but that's no concern of ours, with what the Court's personal opinion is, it's what the law is, that's the thing we're concerned with, what is the law.

(Mr. Sykes) Well, the next point on this 509 which I wanted to make, Your Honor, was the continued reading, the respects in which Section 521 were repealed by this statute. The third respect is, that it's repealed in the case of the sale or selling at retail of any merchandise essential to or customarily sold or incidental to the operation of the aforementioned occupations. Now, that does not mean that the merchandise has to be sold at a bathing beach, it doesn't say that, it says, that the merchandise has to be of the kind of merchandise that is customarily sold at a bathing beach. Now, Your Honor may know about bathing beaches, and about the fact that you can buy almost anything under the sun at some of these large amusement parks in Anne Arundel County. A person who is faced with the problem of what, if anything, he should sell on Sunday has Section 509 and Section 521 before him as if they're written as part of a single section. Section 521 says you can't sell on Sunday and names certain exceptions; and then there is a further exception, repealing 521, which applies to articles customarily sold in all these various institutions, including dancing saloons and Lord knows what. Now, the question is

then, what does 521, as amended, repealed by 509 really prohibit, does anybody know sufficiently, with sufficient definiteness when he sells an article on Sunday that he is violating the sections of 521, when the statute itself has used almost impossibly vague standards, saying that oh, no, you don't violate this if you sell what's customarily sold at all of these things. What is the retailer supposed to do, go take the census of what's sold at all these things? Your Honor could take judicial notice that there is a tremendous amount of material that's sold at these various institutions, and I say to you that the statute 509 has provided an exception as repealed, 521, to such a great and broad extent that when you construe the statute in its entirety it does not meet the requirements of reasonableness, certainty and definiteness that a criminal statute must meet, and therefore it is violative of the due process clause.

(Court) The Court can say in response to it is simply this: if in these cases any sales were made as provided in Section 509 that exception would apply, but as the Court understands it, these are not prosecutions under Section 509, but under Section 521, it doesn't say anything about a number of things that could be said. Now, you asked the Court the question how can you tell from Section 521 what ought to be sold, it says what can be sold, the Court didn't put those words into that act, the General Assembly in the State of Maryland set that up as Section 521 of Article 27, passed by the majority of the legislators of this state, whether wisely or unwisely, that's not for the Court to say. Counsel well knows the wisdom of legislature is not the Court's business, that's the business of the representatives of the people in the General Assembly.

(Mr. Sykes) I hesitate to repeat myself, but as this case will undoubtedly wind its way up the judicial path, I want to make it perfectly clear in the record what my position on this is, so that there can be no misunderstanding. I am under the apprehension that Your Honor does not comprehend the text of our argu-

ment under 509, and for this reason and his reasons from the bench that 509 has nothing to do with this case because this is not a prosecution under 509.

(Court) Court didn't say that at all. The Court says that the exception doesn't effect 521 in so far as 521's applicability to the charges in this case are concerned, that's what the Court is saying. Court knows that that is an exception, the Court knows what happened when that legislation was passed, so you can't say that Court doesn't know anything about it, maybe I can't comprehend it, but I understand it.

(Mr. Sykes) Well, I misunderstood I thought Your Honor said that if this were a prosecution under 509, it may be the 509 language would have significance.

(Court) Court has a few more gray hairs than you do, Mr. Sykes, and knows a little bit more about the history.

(Mr. Sykes) That's perfectly all right, sir, I just wanted to be sure.

(Court) I've lived sixty some years and I believe I know a little bit about this county.

(Mr. Sykes) Well, those are the major points that we have to make, the other point which is also important I'll touch on just briefly, and that is the church and state problem. The Court of Appeals upheld the labor statute as a civil regulation, the Supreme Court hasn't passed on it in over a hundred years and this Court is bound by what the Court of Appeals says, that is for the time being. We make the point in order to preserve it for higher review; the point here, however, is that the rationale under which the earlier statute was upheld cannot be invoked today as a matter of civil law for the upholding of the crazy quilt pattern of statutes which is before the Court today. These statutes before the Court today do not uphold or promote any interest that society may have in the provision of a day of rest for the people of this state. If there were only the statutes that there had been in the first place a general statute, generally applicable to all

work and labor in Anne Arundel County the Levering case would apply, but today with the pattern of statutes which permits you to spend your Sunday in a beer saloon, or dancing saloon to buy anything you want to buy that's customarily sold at bathing beaches, picnic groves or amusement parks and the like, to go bowling, to indulge in all sorts of wordly recreation, and not even recreation, that pattern of statutes can be upheld on the basis that the legislature in its wisdom has provided reasonable means of sanctioning the public interest in a day of rest, and so taking all of these various points, with regard to the conflicts and contradictions and the ridiculousness of the statutes, those things go not only to the question of discrimination and arbitrariness and the like, but they go to the question of religious freedom because the statutes as they are today, as I say, do not, or cannot be sustained on the same basis that the earlier general statute was sustained, and so we ask, if Your Honor please, on all these grounds that the motion to dismiss the warrants be granted, and in order to keep the record clear we haven't had a ruling on any of our motions, we would like to have leave to get this up the best way we can within a reasonable time and file a written motion *nunc pro tunc*, so as to comply with the rule requiring the motion being right.

(Court) Court explained to counsel, at least commented to counsel in the chambers that it would have the privilege of filing as you're required by the rules all motions in writing that are necessary to be presented as have been done earlier in this case. In other words, motion for a postponement, motion for the prosecution be dismissed and motion for removal of the case, motion for prosecution not being filed in thirty days, and motion that the Sunday law violates the Maryland Constitution, and the motion to have the exhibits filed, which counsel will have to do and the Court has agreed to that, if there are no further arguments the Court will proceed to rule on the motions. As to the motion for postponement, the Court regrets

very much that it had to take the position it did in denying the request of eminent counsel for a postponement, but because of what has previously occurred prior to present counsel's association with themselves in the case, up until noon of October the 27th, other counsel representing the same parties had been in contact and communication with the Court over a period of more than a week, and the Court had at least one week ago notified counsel at that time there would be no postponement of these cases today, as far back as October the 2nd. The record shows these parties knew that the machinery of the law and reference to the alleged violations thereof had begun to move, and that there was an attempt to enforce these laws, and that prosecutions were to fail accordingly. So that, the litigants themselves cannot complain to this Court that they have not had adequate time within which to make due, proper and full preparation of their defenses in these cases. And the Court knows, because it has talked with other counsel that they went from one lawyer to another and then finally to you gentlemen, who represents them today, primarily for the purpose of getting these cases postponed, not by counsel but by them as an objective, and the Court feels that it owes a duty, with due respect to the law, that such tactics should not be sanctioned or approved by the Court, consequently, much as it regrets to do it, it will have to overrule the motion for a postponement. As for the motion for the prosecution to be dismissed on the grounds presented, namely, upon warrant, where the case is tried upon warrant and not on information or indictment, the Court feels that, procedurally, as far as it's able to analyze the picture there's nothing wrong with the manner in which these cases have been processed, and therefore, that motion will be overruled. As for the motion for removal of the cases, the Court doesn't feel that there's been any undue notoriety or prejudice prevalent on the part of any newspaper items that may have appeared, which as far as the Court's been able to observe, any narration or news items of what has taken place in the county, and that motion



will be overruled. The other motions, the Court feels, are not substantial from the Court's analysis of the situation, all motions will be overruled. Counsel may have an exception to the Court's ruling and file whatever papers they desire to file.

(Mr. Sykes) I'd like to complete the record and make one more motion, I would like the record to show that the jury was sitting in the court room when the Court made the remarks it did coming from the Court's own knowledge, apparently, as to its reasons for granting the postponement, particularly, the Court's remarks about the tactics of the defendants individually, and the need for respect for the law and the like, and I would urge that the case be postponed on the further ground that the remarks made by the Court to this particular jury panel cannot help by having been prejudicial to the interest of these defendants.

(Court) Motion is overruled.

(Mr. Duvall) I understand from Mr. Mundy that each of the defendants elect a trial before the Court, and at this time I don't believe I have made the motion earlier when these cases were called, the State at this time moves to consolidate these cases for the purpose of trial and ask defense counsel that that motion be made as initially when I called the case, so that your motions which you have argued apply to all of them in a consolidated form.

(Mr. Sykes) I would like the record to show too, if Your Honor pleases, that the election for a trial by the Court is not a completely free election, but was made because of the pressure in counsel's mind induced by the failure to grant the motion for removal, and by the failure to grant the motion for postponement based upon the remarks made to this jury. We do not mean by electing a court trial under these circumstances to waive those motions in any way, we merely try to do the best with what we have without acquiescence in any way.

(Court) Court can ask you, gentlemen, how you want these cases tried, before the Court or Jury?



(Mr. Mundy) May it please the Court, in view of Your Honor's refusing our motion to remove the cases, we feel obligated to accept a court trial.

(Court) Let the record show then, in these various cases 4263, 4264, 4265, 4266, and 4267, and 4268, and 4270 election of court trials has been made by counsel. Does the Court understand, gentlemen, these cases are consolidated for trial by agreement?

(Mr. Mundy) By agreement.

(Court) Let the record show:

(Mr. Duvall) May it please the Court, before proceeding with the first witness I wonder if I may speak with other counsel in the other cases to find out if this jury will be needed today?

(Court) Mary Margaret McGowan, stand up, Court will have the Clerk read the charge to you.

(Clerk read the warrant to the traverser.)

(Clerk) How say ye, are you guilty or not guilty?

(Mary Margaret McGowan) Not guilty."

### THE QUESTIONS ARE SUBSTANTIAL

The Appellants respectfully represent that the Sunday Blue Laws of Anne Arundel County, as applying specifically to that County embody arbitrary and capricious classifications which unlawfully discriminate in favor of certain sales and against others. The original Maryland Sunday Blue Laws prohibited all bodily labor on Sunday excepting only works of charity and of necessity. Article 27 Section 492 Annotated Code of Maryland, 1957 Edition. The constitutionality of that Statute has been upheld by the Court of Appeals of Maryland in *Judefind v. State*, 78 Md. 510; *Levering v. Williams*, 134 Md. 48 and *Ness v. Supervisors*, 162 Md. 529. The instant prosecutions, however, were not brought under the general Sunday Blue Laws and reflected by Section 492 of Article 27, as aforesaid, but under Article 27, Section 521 of the aforementioned Annotated Code of

Maryland, specifically dealing with Sunday sales. That Section provides that no person in the State may sell, dispose of, barter, deal in or give away any articles of merchandise on Sunday, or if the following stated exceptions: Retailers may sell and deliver tobacco, cigars, cigarettes, candies, sodas, soft drinks, ice cream, ices and other confections, milk, bread, fruits, gasoline, oil, grease. The Statute also exempts periodicals, newspapers and apothecaries. Although the said Section 521 purports, on its face, to be applicable to the entire State of Maryland as a general law, nevertheless the Legislature of the State of Maryland in 1941 passed Section 509 of Article 27 which repealed, among others, said Section 521 so far as it is applicable to Anne Arundel County, Maryland, to the extent that said earlier Statute prohibits the operating on Sunday of any bathing beach, bath house, amusement park, dancing salon, picnic groves, amusements, games, amusement devices, entertainments, shows and the hiring or renting of boats, tables, chairs and beach umbrellas. *The said Section 509 as enacted in 1941 by the Legislature also specifically permits the sale or selling at retail of any merchandise essential to, or customarily sold at or incidental to the operation of the aforementioned occupations or businesses. (Emphasis supplied.)* Inasmuch as these exceptions have been provided for the residents of Anne Arundel County, without the same privileges being afforded to other residents of the State of Maryland, in its other Counties and Baltimore City, these Appellants respectfully contend that such Statute is arbitrary and discriminatory.

The Plaintiffs contend that this Act is unconstitutional in that it is discriminatory and in violation of the equal protection clause of the 14th Amendment of the Federal Constitution and Article 23 of the Maryland Declaration of Rights.

The statute adopted and known as the Sunday Blue Laws was a general law. A general law is defined as one which the provisions embrace the whole of a subject and the subject matter is of common interest to the whole State. The uniformity that is required is to prevent the granting to any person or class of persons the privileges or immunities which upon the same terms do not belong to all persons. *Sutherland Statutory Construction* (3rd Ed. Horach) Sec. 2102.

The appellants contend that the Sunday Blue Law as applied to Anne Arundel County is illusory. There is no apparent difference in a sale of an item whether it be in one County or another. If an item cannot be sold, it should not be permitted to be sold anywhere in the State. If it is permissible to sell an item on a bathing beach, then this item should be sold at any business establishment throughout the State. The Power of the Legislature to restrict the application of Statutes to localities less in extent than the entire State is not unlimited. It cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, unless, there is some difference between the conditions in the territory selected and in the conditions in the Territory not affected by the Statute sufficient to afford some bases however slight for classification. *Md. Coal & Realty v. Bureau of Mines*, supra, Opinion of Atty. General of Md., April 30, 1959.

Persons situated alike must be treated alike. *Maryland Coal v. Bureau of Mines*, 69 A. 2d 471, 193 Md. 627; *Dasch v. Jackson*, 170 Md. 251, 183 A. 534; *Reid Development Corp. v. Passippang-Troy Hills T. P.*, 10 N.J. 229, 89 A. 2d 667 (1952); 12 Am. Jur., Sec. 557, p. 251. *In Re: Van Horne*, 74 N.J. Eq. 600, 70 A. 986 (Ch. 1903); *Galloway v. Wolfe*, 117 Neb. 824, 223 N.W. 1, 62 A.L.R. 637 (Neb. 1929); *Sarner v.*

*Union T. W.*, 151 A. 2d 208. In the latter case the Superior Court of New Jersey decided that the Sunday closing law prohibiting the sale of certain merchandise on Sunday and providing criminal penalties for its violation by excluding from its operation the counties of Atlantic, Cape May and Ocean arbitrarily and unlawfully discriminated between members of the general public and there was no real and true basis for the classification made.

Arbitrary selection can never be justified by calling it classification. The Equal protection required by the Fourteenth Amendment forbids this. *Gulf C. & S. Fr. Co. v. Ellis*, 165 U.S. 150, 17 S. Ct. 225, 41 L. Ed. 666 (1897). In *Harford Steam Boiler Inspection & Insurance Co. v. Harrison*, 301 U.S. 459, 462, 57 S. Ct. 838, 81 L. Ed. 1223, 1226 (1937), *Jeffrey Mfg. Co. v. Blogg*, 235 U.S. 576, *Lindsley v. Natural Carbonic Gas*, 220 U.S. 61, it was said that discriminations are not to be supported by mere fanciful conjecture and that they cannot stand as reasonable if they offend the plain standards of common sense. See *Colgate v. Hervey*, 296 U.S. 404.

The Attorney General of Maryland when called upon to rule on the constitutionality of House Bill No. 265 which sought to establish minimum Retail Prices for whiskey but exempted Montgomery County because of its geographical location, stated in his Opinion April 30, 1959 the bill was unconstitutional.

A similar exception was invalidated by the Florida Court of Appeals in the case entitled *Anderson v. Antonucci*, 62 Fla. 25.

There have been many State Court decisions regarding a wide variety of unexplainable and irreconcilable classifications and exceptions to the Sunday Sale Laws. *Mosco v. Dunbar*, 309 P. 2d 581 (Colo. 1957); *Denger v. Bank* (1899),

26 Colo. 530, 58 P. 1089; *Mergren v. Denver*, 104 P. 395, 46 Colo. 385; *Gundaker Motors v. Cassert*, 127 A. 2d 566 (N.J. 1956). But in most of these cases the classifications were uniformly affected wherever situate within the State.

It appears from the cases that in order to be held constitutional a classification must not only be reasonable and not arbitrary but must rest upon a difference having a fair and substantial relation to the object of the Legislation. *Anderson v. Antonacci*, 62 Fla. 25, 62 So. 25; *Old Dearborne Distributing Co. v. Seagram Distillery Corp.*, 299 U.S. 183; *Colgate v. Hervey*, 296 U.S. 404, 422-423; 56 Sup. Court 253, 102 A.L.R. 54.

Maryland has held, in many cases, that the Legislation may not, under the cloak of Police power, exercise a power forbidden by the Constitution. *Dasch v. Jackson*, 170 Md. 251; *American Coal Co. v. Allegany County Commissioners*, 59 Md. 185; *Chesapeake & Potomac Co. v. State Board of Forestry*, 125 Md. 666. *Md. Coal & Realty v. Mines*, 39 A. 2d 471.

Various reasons have been given for this type of special classification Legislation being entered upon the Statutes of the various States. See 12 Rutgers Law Review 505 (1958).

To permit the sale of intoxicants and the operation of slot machines, pin ball machines and bingo on Sunday, as well as the other exceptions which the Statute here in question permits, is in effect to change the nature of the law from one of a general closing with exceptions to a law aimed at certain classes of businesses with a general exception to others, which, in effect, grants a special privilege to the excepted legal class while without legal excuse denying them to others. *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939.

The Trial Court below admitted that the Legislation in question was "ridiculous", and your Appellants contend that permitting the excepted sales is the very antithesis of the spirit of Sunday observance while prohibiting sales and conduct which by any test are incomparably more innocuous of the sales and activities permitted. Obviously such discriminatory Legislation must lead to discriminatory enforcement.

Section 509 of Article 27 of the aforementioned Annotated Code of Maryland permits the sale or selling of any novelties, souvenirs, accessories or other merchandise essential to or customarily sold at, or incidental to the operation of bathing beaches, bath houses, amusement parks or dancing salons. The language of the Statute permits the sale of such merchandise throughout Anne Arundel County generally. It cannot be imagined that the Legislature intended to permit sales in a dancing salon of the same articles which are prohibited elsewhere, and yet the language of the Statute would imply otherwise. A Statute which permits one type of outlet to sell the same commodities which it prohibits another outlet from selling has generally been held unconstitutional. *Mt. Vernon v. Julian*, 369 Ill. 447, 17 N.E. 2d 52; *Allen v. Colo. Springs*, 101 Colo. 498, 75 P. 2d 141; *Ellicott v. State*, 29 Ariz. 389, 242 P. 340.

The said Section 509 of Article 27 is obviously extremely vague. One could not determine what merchandise is customarily sold at bathing beaches, bathhouses, amusement parks, dancing saloons, etc. without making a survey of those particular establishments and with the ever widening scope of business there is always the possibility that although a particular item is not sold at one of those establishments today that it may nevertheless become standard merchandise with it tomorrow. The fact that Section 509



gives so much leeway to the operators of the permitted establishments in the sale of merchandise on Sunday aggravates the discriminatory character of the Legislative pattern and reinforces your Appellant's argument on this point.

The question of the constitutionality of the Sunday Blue Laws has been presented to the Supreme Court of the United States in the past, among others, in the following cases: *Hemington v. Georgia*, 163 U.S. 299, 41 U.S. (14 Ed.) 166; *Petit v. Minn.*, 177 U.S. 164, 20 S. Ct. 666, 44 U.S. (L. Ed.) 716; *Joe Towerly v. State of N. C.*, 347 U.S. 925 (1954); *Sam Friedman v. New York*, 341 U.S. 907.

The problem has also been presented on the Federal District Court level in *Swann v. Swann*, 21 Fed. 299; and *Crown v. Kosher Super Market of Mass. v. Gallagher*, U.S. District Court of Mass. decided May 18, 1959 in 27 Law Week 2614.

It is respectfully contended that the enforcement of the Sunday Blue Laws as applicable to Anne Arundel County violates the guarantee of freedom contained in the 1st and 14th amendments of the Constitution of these United States.

No citizen can be required by Law to do, or refrain from doing, any act upon the sole ground that it is a religious duty. The idea that religious faith and practice can be and should be enforced by physical force and penal statutes has no place in the American Doctrine of Government. The State cannot be the keeper of the religious conscience of its citizens. The State is to protect all religions but espouse none. Every person is individually answerable to his God for his faith and his works and must therefore be left free to imbibe and practice any faith he chooses so long as he does not interfere with the rights of his neigh-



ber. *Everson v. Board of Education*, 330 U.S. 1; and *McCullum v. Board of Education*, 33 U.S. 203.

### CONCLUSION

For all of the reasons hereinabove cited, it is respectfully submitted that the questions raised by this Appeal are substantial and of public importance and should be respectfully received by this Honorable Court.

It is submitted that the Decision of the Court of Appeals of Maryland is contra to the Constitution of the United States.

Respectfully submitted,

HARRY SILBERT,

A. JEROME DIENER,

SIDNEY SCHLACHMAN,

J. SEYMOUR SUREFF,

For Appellants.

## APPENDIX A

**STATUTES AND RESOLUTIONS INVOLVED**

ARTICLE 27, 492 — Working, on Sunday; Permitting Children or Servants to Game, Fish, Hunt, Etc.

No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (work of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation; and every person transgressing this section and being hereof convicted before a justice of the peace shall forfeit five dollars, to be applied to the use of the county.

ARTICLE 27, Sec. 521 — Sale, Etc., of Merchandise on Sunday; Excepted Articles; Second and Subsequent Offenses; Revocation of License.

No person in this State shall sell, dispose of, barter, or deal in, or give away any articles of merchandise on Sunday, except retailers, who may sell and deliver on said day tobacco, cigars, cigarettes, candy, sodas and soft drinks, ice, ice cream, ices and other confectionery, milk, bread, fruits, gasoline, oils and greases; and any person violating any one of the provisions of this section shall be liable to indictment in any court in this State having criminal jurisdiction, and upon conviction thereof shall be fined a sum of not less than twenty nor more than fifty dollars, in the discretion of the court, for the first offense, and if convicted a second time for a violation of this section, the person or persons so offending shall be fined a sum not less than \$50 nor more than \$500, and be imprisoned for not less than 10 nor more than 30 days, in the discretion of the court, and his; her or their license, if any was issued, shall be declared null and void by the judge of said court; and it shall not be lawful for such person or persons

to obtain another license for the period of twelve months from the time of such conviction, nor shall a license be obtained by any other person or persons to carry on said business on the premises or elsewhere; if the person, so as aforesaid convicted, has any interest whatever therein, or shall derive any profit whatever therefrom; and in case of being convicted more than twice for a violation of this section, such person or persons on each occasion shall be imprisoned for not less than thirty nor more than sixty days, and fined a sum not less than double that imposed on such person or persons on the last preceding conviction; and his, her or their license, if any was issued, shall be declared null and void by the court, and no new license shall be issued to such person or persons for a period of two years from the time of such conviction; nor to any one else to carry on said business where he or she is in anywise interested; as before provided for the second violation of the provisions of this section; all the fines to be imposed under this section shall be paid to the State. This section is not to apply to apothecaries and such apothecaries may sell on Sunday drugs, medicines and patent medicines as on week days; and this section shall not apply to the sale of newspapers and periodicals.

ARTICLE 27, Sec. 522 — Keeping Open or Using Dancing Saloon, Opera House, Tenpin Alley, Barber Saloon or Ball Alley on Sunday.

It shall not be lawful to keep open or use any dancing saloon, opera house, tenpin alley, barber saloon or ball alley within this State on the Sabbath day, commonly called Sunday; and any person or persons, or body politic or corporate, who shall violate any provision of this section, or cause or knowingly permit the same to be violated by a person or persons in his, her or its employ shall be liable to indictment in any court of this State having criminal jurisdiction, and upon conviction thereof shall be fined a sum not less than fifty dollars nor more than one hundred dollars, in the discretion of the court, for the first offense; and if convicted a second time for a violation of this sec-

tion, the person or persons or body politic or corporate shall be fined a sum not less than one hundred nor more than five hundred dollars; and if a natural person shall be imprisoned, not less than ten nor more than thirty days in the discretion of the court; and in the case of any conviction or convictions under this section subsequent to the second, such person or persons, body politic or corporate shall be fined on each occasion a sum at least double that imposed upon him, her, them or it on the last preceding conviction; and if a natural person, shall be imprisoned not less than thirty nor more than sixty days in the discretion of the Court; all fines to be imposed under this section shall be paid to the State.

ARTICLE 27, Section 509 — Beaches, Amusement Parks, Picnic Groves, Etc., in Anne Arundel County.

It shall be lawful to operate, work at, or be employed in the occupations of operating any bathing beach, bathhouse, amusement park, dancing saloon, the sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses, at retail, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows and the hiring or renting of boats, tables, chairs, beach umbrellas, on the first day of the week, commonly called Sunday, within Anne Arundel County, and §§492, 521 and 522 of this article are repealed, in so far and to the extent that they prohibit the operating of and or the working of or employment of persons in the operation of any bathing beach, bathhouse, amusement park, dancing saloon, the sale or selling at retail of any merchandise, essential to or customarily sold or incidental to the operation of the aforesaid occupations or business, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows, and the hiring and renting of boats, tables, chairs, beach umbrellas, on the first day of the week commonly called Sunday, in Anne Arundel County.

ARTICLE 2B, Section 28 — Anne Arundel County.

(a) *Special Sunday licenses.* — (1) Notwithstanding any other provision of this article, no license for sale of alcoholic beverages issued by the board of license commissioners for Anne Arundel County (except "special license" provided for in §22 of this article) shall be deemed to nor shall it permit or authorize the holder thereof to sell any alcoholic beverages in Anne Arundel County after 2 A.M. on Sundays, except as hereinafter provided.

(2) Any person holding a license for the sale of alcoholic beverages in Anne Arundel (except persons holding any Class BP, WP, LP, or LT license, "Package Goods — off sale license," "six day tavern license," or "special licenses") issued by the board of license commissioners of Anne Arundel County, shall upon application made as for new licenses and approval thereof by the board of license commissioners for Anne Arundel County, as provided for by Sections 60 and 67 (c) of this article, be issued a license to be known as a "special Sunday license," upon payment of the fee therefor as provided herein.

(3) Such "special Sunday license" shall authorize the holder thereof to sell alcoholic beverages of the same kind, and subject to the same limitations as to hours, alcoholic content of the beverages to be sold thereunder, restrictions and provisions, as govern such other license for the sale of alcoholic beverages, issued to and held by the holder of such "special Sunday license," on each Sunday. No "special Sunday license" shall be issued to any person who does not hold an alcoholic beverage license of some other class issued by the board of license commissioners for Anne Arundel County.

(4) An annual fee of ten dollars (\$10.00) shall be paid for each "special Sunday license" issued. "Special Sunday licenses" shall be issued by the clerk of the Circuit Court for Anne Arundel County, who shall retain a fee of fifty cents (50c) for the issuance of each such license.

(5) "Special Sunday licenses" may be renewed in the same manner as other licenses for the sale of alcoholic beverages under this article. "Special Sunday licenses"

issued under the provisions of this section shall not be construed to be "special licenses" under the provisions of Section 68 of this article.

(6) The granting of a "special Sunday license" in addition to a license of any other class, to the same licensee, shall not be deemed to be in conflict with the provisions of Section 41 of this article.

(7) Whenever any other license held by the holder of a "special Sunday license" is suspended or revoked, in such case the "special Sunday license" of such licensee must likewise be suspended or revoked.

(8) Nothing in Section 46 of this article shall be construed to prohibit any person who holds any other class of alcoholic beverage license issued by the board of license commissioners for Anne Arundel County from obtaining a "special Sunday license".

(9) This section shall apply to the first, second, third, fourth, fifth, seventh and eighth districts of Anne Arundel County only.

(10) This section shall not apply to beach and amusement park licenses issued in Anne Arundel County.

*Note:* For licensees in Anne Arundel County entitled to special Sunday licenses, see the following sections of Art. 2B: 9 (Beer License, Class BR, restaurant with music, dancing and other legal entertainment); 14 (Beer and Light Wine, Class WR, hotels and restaurants with music, dancing and other legal entertainment); 15 (Beer and Light Wine, Class WC, clubs); 16 (Beer and Light Wine, Class WT, on sale, taverns without music, dancing, etc., and WTM, on sale, taverns with music but without dancing); 19 (Beer, Wine and Liquor, Class LR, on sale, restaurants with music but without dancing, and Class LRD, on sale, restaurants with music, dancing, etc.); 20 (Beer, Wine and Liquor, Class LC, Clubs); 21 (Beer, Wine, Liquor, Class LTM, tavern open seven days weekly, with music but without dancing).



Code of Local & Public Laws of Anne Arundel County  
(Flack, 1947) Sections 384, 385 as Enacted By Chapter  
321 of the Acts of 1943.

384. The County Commissioners of Anne Arundel County when exercising the powers vested in them to issue licenses as authorized by Section 383 are authorized and empowered to designate the kinds and types of carnivals, circuses, shows, amusement rides, and amusement devices which may be operated in Anne Arundel County, and make regulations for the operation thereof in Anne Arundel County under the said licenses, and may designate kinds and types of carnivals, circuses, shows, amusement rides, and amusement devices which may not be operated in Anne Arundel County, as detrimental to the health, morals and safety of the people and property of Anne Arundel County.

385. The County Commissioners of Anne Arundel County are hereby authorized and empowered to permit the issuance of any prize or award in the operation of any such carnival, circus, show, amusement ride, or amusement device licensed under authority of Sections 383 and 384 as an award or prize for skill or score attained.

#### ANNE ARUNDEL COUNTY AMUSEMENT DEVICE LICENSES

Resolution adopted by the County Commissioners of Anne Arundel County at the regular meeting held on the 11th day of March 1952 repealing all prior resolutions and regulations relating to the licensing and regulation of amusement devices and amusements operated in Anne Arundel County and adopting regulations and licenses in lieu thereof.

WHEREAS enactment of Chapter 321 of the Acts of 1941, Chapter 321 of the Acts of 1943 and Chapter 1013 of the Acts of 1945 of the General Assembly of Maryland, the County Commissioners of Anne Arundel County have been authorized to license and make regulations for the operation of carnivals, circuses, shows, amusement rides, amusement devices and other types of meets and events in Anne Arun-



del and to designate the kinds and types thereof which may not be operated in the said County.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY, in regular session assembled, this 11th day March 1952, that

(a) the resolutions of the County Commissioners of Anne Arundel County heretofore adopted establishing license fees and regulation for the operation of amusement devices, carnivals, and amusement games be and the same are hereby repeal effective April 30th, 1952, and in lieu thereof the following regulation and license fees are hereby established effective May 1, 1952, pursuant to the authority vested in the County Commissioners of Anne Arundel County:

(1) It shall be unlawful to operate any carnival, amusement devices, game or event for which licenses are hereby established without having procured any such license within the First, Second, Third, Fourth, Fifth, Seventh or Eighth Election Districts of Anne Arundel County.

(2) It shall be lawful to obtain the following classes of licenses to be issued by the Clerk of the Circuit Court of Anne Arundel upon payment of fees hereinafter set forth plus \$1.00 Clerks fee for each license issued.

CLASS A. Licenses — CIRCUSES \$50.00 per day.

Special regulations relating to the operation of Circuses:

No such license shall permit the operation of any circus on any Sunday and the operation of any circus on any Sunday is hereby prohibited.

A circus license shall permit the presentation of performance or by persons and animals, but shall not permit the operation of any gaming or amusement devices in which the patrons of the licensed premises participate.

CLASS H Licenses — PIN BALL GAMES — CONSOLE DEVICES  
\$275.00 per annum

Each such license shall authorize the operation of one such device and shall include all types of "pin ball games" and "console devices" operating on either the "spinner type" or "reel type" principle, but shall not permit the operation of any "slot machine of the so-called one arm type" under such license.

It shall be lawful for such licensed device to pay out as an award any token, merchandise, ticket, coin, prize or other thing of value.

No such license shall be issued for any such device requiring a coin of greater value than 5¢ in its operation.

No more than eight Class H Licensed devices may be placed in any one location; all devices over four shall be placed only upon the written permission of the County Commissioners of Anne Arundel County or their authorized agent.

CLASS L Licenses — BEACH AND RESORT QUALIFYING  
LICENSE \$300.00 per annum

Each such license shall authorize the holder thereof to purchase as many Class M licenses for the use in any one location as may be desired.

No Class L license shall be issued except to bona fide operators of bathing beaches located directly on the shores of the Chesapeake Bay and or its tributaries, which beaches are operated as such on a seasonable basis from April 1 to October 31 only.

A separate Class L license must be secured for each separate place of business in which Class M licensed devices are to be operated.

## CLASS M Licenses — SLOT MACHINES

\$500.00 per summer season

Each such license shall permit the operation of from 1 to 10 slot machines of the so-called one arm type, or from 1 to 10 Class H licensed devices at one location. For each additional unit of from 1 to 10 such devices operated in one location an additional Class M license shall be required.

No Class M license shall be issued except to holders of Class L licenses.

Devices licensed under Class M licenses may be operated only during the months of May, June, July, August, September and October of the year of issuance and during the month of April of the next succeeding year.

It shall be lawful for such licensed device to issue as an award for score achieved any merchandise, token, coin or other thing of value.

No such license shall be issued for any device requiring a coin of greater value than 5¢ for its operation.

Each Class L qualifying license and each Class M license shall be displayed under glass at the authorized place of operation.

It shall be unlawful knowingly, wilfully or intentionally to permit any person under 16 years of age to operate any such device.

Each device operated under a Class M license shall have attached to it a notice printed in type of not less than one-half inch in height that it is unlawful for any minor under 16 years of age to play any such device.

\* \* \* \* \*

### RESOLUTION

RESOLUTION ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY at their regular meeting held on the 7th day of October 1958, adding to and amending the resolution adopted on the 11th day of April,

1957, relating to the licensing and regulation of amusement devices and amusements operated in Anne Arundel County.

BE IT RESOLVED by the Board of County Commissioners of Anne Arundel County, in regular session assembled, this 7th day of October, 1958, that the provisions for the issuance of CLASS NA, CLASS NB, CLASS NC, CLASS ND, AND CLASS NE BINGO LICENSES and all regulations appertaining thereto adopted on the 11th day of April 1957, be and the same are hereby repealed and in lieu thereof five (5) new classes of licenses for the operation of bingo games and regulations for same are hereby adopted and added to the Amusement Device Licenses for Anne Arundel County to read as follows:

Class NA Licenses —

BINGO GAMES — not exceeding 250 persons — seating or player capacity — \$1,000.00 per annum.

Class NB Licenses —

BINGO GAMES — not exceeding 500 persons — seating or player capacity — \$2,000.00 per annum.

Class NC Licenses —

BINGO GAMES — not exceeding 1,000 persons — seating or player capacity — \$4,000.00 per annum.

Class ND Licenses —

BINGO GAMES — BEACH BINGO LICENSE — not exceeding 500 persons seating or player capacity — \$500.00 per annum.

Class NE Licenses —

BINGO GAMES — BEACH BINGO LICENSE — not exceeding 1,000 persons seating or player capacity — \$1,000.00 per annum.

No such license shall be transferrable.

No such license shall be issued if it be found that the operation of any such game will unduly disturb the peace and quiet of the neighborhood in which it is proposed to operate such game.

No license to operate such game shall be issued for other than a permanent type of building, which building shall be under roof.

No license to operate such game shall be issued for any outdoor area.

The Board of County Commissioners may revoke any such license when the licensee had been found guilty by a court of competent jurisdiction, of violating any provision of this regulation.

No Class NB, Class NC Bingo License shall permit the operation of any bingo games on any Sunday.

Effective upon the adoption of the Resolution the total number of all Class NA, Class NB, and Class NC Bingo Licenses issued hereafter shall be limited to seven (7), except that present holders of Class NA, Class NB, and Class NC Bingo Licenses shall be permitted to renew their said licenses annually and shall be counted in the total number issued.

Present holders of Class NA, Class NB, Class NC, Bingo Licenses shall be permitted to continue to operate bingo games under the licenses now held until the expiration date of the said licenses without payment of any additional license fee therefor, but subject nevertheless to all of the regulations adopted hereunder.

#### DECLARATION OF RIGHTS

Article 19. Remedy for injury to person or property. That every man, for any injury done to him in his person or property, ought to have remedy by the course of the law of the land, and ought to have justice and right, freely

without sale, fully without any denial, and speedily without delay, according to the Law of the land.

Article 23. *Due Process*. That no man ought to be taken or imprisoned or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

## APPENDIX B

*In the Court of Appeals of Maryland*

No. 237

September Term, 1958

Margaret M. McGowan, et al.

State of Maryland

Brune, C. J., Henderson, Hammond, Horney, J. J.

Opinion by Hammond, J.

Filed: May 14, 1959

Seven persons, convicted of making sales of merchandise forbidden on Sunday in Anne Arundel County, argue in their appeal that the trial court committed reversible error (1) in refusing to remove or postpone their trials; (2) in denying motions to dismiss the prosecutions based on the

claims the Sunday Blue Law is unconstitutional (a) as violating the right of religious freedom guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, (b) as discriminating arbitrarily in favor of certain sales and against others, and (c) as being vague and indefinite, all contrary to the Fourteenth Amendment and Articles 19 and 23 of the Maryland Declaration of Rights; and (3) in refusing to direct verdicts as to some of the accuseds after the evidence was in.

Code (1957), Art. 27, deals with "Sabbath Breaking" in Sections 492 to 534. Section 492 prohibits "bodily labor" on Sunday throughout the State, "works of necessity and charity always excepted," as well as any "unlawful pastime or recreation." Section 521 prohibits throughout the State the sale, barter or gift on Sunday of any merchandise except tobacco, cigars, cigarettes, candy, sodas and soft drinks, ice cream, and other confectionery, milk, bread, fruits, gasoline, oil and greases, drugs, medicines and patent medicines, and newspapers and periodicals. Section 522, also State-wide in operation, makes it unlawful to keep open or use on Sunday any "dancing saloon, opera house, tenpin alley, barber saloon or ball alley." Section 509 repeals pro tanto Sections 492, 521 and 522 in Anne Arundel County insofar as they prohibit there the operating of, or working at, any "bathing beach, bathhouse, amusement park, dancing saloon", and permits in the County on Sunday the "sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses, at retail, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows. . . ."

For some time before September 1958 the Sunday laws had not been enforced regularly or vigorously in Anne Arundel County. Then, because of complaints that a newly opened branch of an interstate chain of stores was flouting the law to a degree exceeding that considered reasonable by competitors, the Anne Arundel County police began and continued an extensive and non-discriminatory crack-



down on forbidden Sunday sales. The appellants, all employees of the new store, were arrested for, and charged with, selling merchandise on Sunday in violation of Section 521.

Counsel for appellants, retained the day before the trial, asked Judge Michaelson in chambers on the morning of the trial for a postponement or removal of the trial. They were told the motions would not be granted but that they would have to be made and denied in open court. Then, in the courtroom in which the jury panel was seated, appellants requested removal of their trials from the Circuit because "there has been considerable agitation concerning these so-called Sunday Laws in this County," said they did not have the necessary affidavits prepared, and asked for a ruling on the motion as if the formalities had been complied with, and leave to file the motion and supporting newspaper clippings to show the prevailing sentiment of the community. Leave was granted for the late filing of the motion and supporting data, and the removal was denied. The motion to postpone the case because of the late employment of counsel also was denied. As to this the court said that some twenty-six days earlier he had told counsel then representing appellants that there would be no postponement and that the litigants could not now complain fairly of lack of time to make full and proper defense. The court went on to say that, from what he had been told by prior counsel for appellants, the litigants "went from one lawyer to another and then finally to you gentlemen, who represent them today, primarily for the purpose of getting these cases postponed . . . and . . . that such tactics should not be sanctioned or approved by the Court, consequently, much as it regrets to do it, it will have to overrule the motion for a postponement."

The appellants say it was an abuse of discretion for the trial judge not to grant either the motion for removal or the motion for postponement because, after he made the remarks he did in the presence of the prospective jurors, who were seated in the courtroom, they had to take a court trial or be tried by a prejudiced jury. We find no prejudicial

error. It would appear from the record that the court had told counsel in chambers that he would deny both the removal and the postponement and that counsel, before they entered the courtroom, had decided to have the cases tried by the court because of the refusal to remove the case, not because of the refusal to postpone the trials, and not because of the court's remarks in the presence of the jury.

A new panel of jurors was not requested, which could have been done if a jury trial had been wanted, because of what had been said by the court. In any event, the remarks of the court as to the reasons for refusing a postponement cannot reasonably be expected to have had the effect the appellants seek to give them. They were no more than revelations of knowledge the judge had obtained officially from agents of the appellants during the progress of the case, and there is no reason to suppose that a jury chosen from the panel seated in the courtroom would have been influenced as to the guilt or innocence of the appellants by hearing the judge temperately say that they had attempted to postpone their trials.

There is no indication in the record that community sentiment was aroused, or adverse to Sunday sales or the appellants. If anything, the newspaper accounts of the new police enforcement of the Sunday laws were more sympathetic to the position of appellants than otherwise.

It is settled that refusal to remove a non-capitol criminal case is not subject to review by this Court except upon a showing of abuse of discretion. *Piracci v. State*, 207 Md. 499, 508-509. We find no such abuse in Judge Michaelson's refusal to remove or postpone the case.

The appellants' argument that the Sunday Blue Laws are unconstitutional as violating the right of religious freedom has been answered many times by this and other courts, which have held that the basic purpose of such statutes, with their exceptions, is the civil establishment and regulation of a day of rest from work, not a law respecting the establishment of religion or prohibiting the free

exercise thereof, and that the statutes do not offend the First and Fourteenth Amendments to the Constitution of the United States. *Judefind v. State*, 78 Md. 510; *Levering v. Park Commissioners*, 134 Md. 48; *People v. Friedman* (N.Y.), 96 N.E. 2d 184, 186, and cases cited therein (appeal dismissed for want of a substantial federal question, 341 U.S. 907). We have been shown no reason why we should depart from these holdings.

The argument of unconstitutionality on the ground of discrimination likewise has been answered before by the cases. The legislative plan is plain. It is to compel a day of rest from work, permitting only activities which are necessary or recreational. There can be, and often are, sharp differences of opinion as to what is necessary and what is proper or preferred recreation, but the answers must be given by the legislature, and if they are not clearly arbitrary or oppressively discriminatory, the legislative choice must be sustained. In *Ness v. Baltimore*, 162 Md. 529, 538, Chief Judge Bond, in upholding the Baltimore City ordinance permitting specified amusements, games and sports on Sunday afternoons and permitting certain retail sales on Sunday, said for the Court (in reference to alleged discriminations in the statute): "But what is tolerable and what intolerable in Sunday observance seems to be a question which cannot be fully answered by a process of reason. It is to a large extent determined by the public conceptions of proper respect for the day, and these conceptions are the outcome of public sensibilities not based entirely upon any process of reasoning. Regulations to conform to the public conceptions can, perhaps, be less easily shaped by logical reason than almost any other governmental regulations. The constitutional prohibitions stand ready to prevent a clearly arbitrary and oppressive discrimination. But the mere fact of inequality is not enough to invalidate a law, and the legislative body must be allowed a wide field of choice in determining what shall come within the class of permitted activities and what shall be excluded." See, too, *Brown v. State*, 177 Md. 321, and *People v. Friedman*, *supra*.

Appellants say that the Anne Arundel exceptions to the state-wide law go beyond those sanctioned in the Ness case because they permit the operation of bathhouses, bathing beaches, amusement parks and related facilities, and the sale of articles customarily sold at, or incidental to the operation of these facilities, as well as the sale of alcoholic beverages, and the operation of slot machines, pinball machines, and bingo games.

What is permitted all comes within the category of recreation, long recognized as a permissible Sunday activity. That we might think more appropriate or wholesome forms of recreation could have been chosen by the Legislature is of no moment, if those that were (presumably as reflecting the prevailing sentiment of the community) are not arbitrarily discriminatory or oppressive. We find the arguments of appellants on this point no more than the claim that the statutes are unwise, and, if they are right, this of itself does not make the law invalid.

We come to the contention that the Anne Arundel County Sunday law is unconstitutionally vague, because no merchant can know whether or not the article he sells on that day is a novelty, souvenir, accessory or piece of merchandise "essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, bathhouses, amusement parks or dancing saloons. This argument is made on the premise that Sec. 509 broadens the exceptions of Sec. 521 throughout Anne Arundel County so that anything "customarily sold at" a bathing beach, bathhouse, amusement park or dancing saloon can be sold on Sunday anywhere in the County. It may well be that the legislative intent in Sec. 509 was to permit the use and enjoyment by the public on Sunday of the specified places of recreation and to insure that enjoyment by allowing patrons to buy, on the spot, what they customarily could buy to use the facilities to the fullest. We need not decide whether sales were intended to be limited to the places of amusement specifically allowed to operate on Sunday. If we assume, as do the appellants, that the language of Sec. 509 is broad enough to permit sales anywhere in the County,

we do not find Sec. 521 as so broadened by Sec. 509 unconstitutionally vague.

A criminal statute must be sufficiently explicit to enable a person of ordinary intelligence to ascertain with a fair degree of precision what it prohibits and what conduct on his part will render him liable to its penalties, or it will affront the constitutional guarantees of due process. But such a statute is not void for indefiniteness merely because it exacts the burden of rightly estimating a matter of degree, or because juries may differ in their judgments in cases brought under it on the same state of facts. *State v. Magaha*, 182 Md. 122, 125. See also *Ruark v. Engineers' Union*, 157 Md. 576, 583, et seq., and *Glickfield v. State*, 203 Md. 400, 404. Section 509 clearly informs those who read it as to the type of articles that may be sold on Sunday in Anne Arundel County. We think that a person of ordinary intelligence could know with a fair degree of precision what he could or could not sell.

As the Supreme Court has noted, a statute is not to be condemned because there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls. *United States v. Petrillo*, 332 U.S. 1, 7, 91 L. Ed. 1877 (there the statute, upheld against the defense of unconstitutional vagueness, made it a criminal offense to coerce a radio broadcaster to employ, or agree to employ, any person in excess of the number needed to perform actual services). In *Boyce Motor Lines v. United States*, 342 U.S. 337, 339, 340, 96 L. Ed. 367, 370, 371, there was involved the regulation of the Interstate Commerce Commission, authorized by 18 U.S.C. Sec. 835, that required a driver of an interstate motor vehicle, transporting explosive or inflammable substances, to avoid "so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." The Supreme Court said, treating the regulation as a criminal statute: "... no more than reasonable degree of certainty can be demanded. Nor is it unfair to require

that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." In *Sproles v. Binford*, 286 U.S. 374, 393, 76 L. Ed. 1167, 1182, the words in a criminal statute "shortest practicable route" were held not too vague to be unconstitutional.

The court should have directed verdicts for them say five of the appellants. One sold a toy submarine and four sold staplers. It is argued that the submarine is "merchandise" and the staplers "accessories" that are "customarily sold at" a bathing beach. There was no error in refusing to direct the verdicts. It is not so clear that these articles are customarily sold at a bathing beach that the court could so rule as a matter of law. It was for the trier of fact to decide whether the submarine and the stapler had been excepted by the statute or not. *Callan v. State*, 156 Md. 459, 466, 467. There the accused was convicted of running an "opera house" on Sunday. He claimed reversible error in the refusal of the trial court to permit him to produce a witness to testify "as to what is an opera house" in support of his contention that his business, that of showing motion pictures, was not within the meaning of that term. This Court rejected that contention on the ground that what constituted an opera house was a question to be decided by the jury on the basis of "ordinary experience."

The judgments will be affirmed.

JUDGMENTS AFFIRMED. WITH COSTS.



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

**No. 8**

MARGARET M. MCGOWAN, ET AL.,

*Appellants,*

v.

STATE OF MARYLAND,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF MARYLAND

**BRIEF OF APPELLANTS**

**OPINION BELOW**

The opinion of the Court of Appeals of Maryland is reported in 151 A. 2d 156, 220 Md. 117.

**JURISDICTION**

This suit was brought under 28 U.S.C. Sec. 1257(2) to reverse the Court of Appeals, the highest Court of the State of Maryland, whose mandate was filed May 14, 1959, and notice of Appeal was filed in that Court on August 3, 1959. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Section 1257(2). Order noting Jurisdiction, on April 25, 1960.



## QUESTIONS PRESENTED

Whether the Sunday Blue Laws applicable to Anne Arundel County are unconstitutional in that

I. They contravene the 14th Amendment to the Constitution of the United States and Articles 19 and 23 of the Maryland Declaration of Rights because they embody arbitrary and capricious classifications which unlawfully discriminate in favor of certain sales and against others.

II. The legislature in its enactment of the law has deprived citizens of one part of the State of rights and privileges which they enjoy in common with the citizens of all other parts of the State constituting classification legislation for Anne Arundel County making certain Sunday Sales a crime.

III. They are arbitrarily discriminatory and so vague as to fail to give reasonable notice of the conduct intended to be prohibited thereby.

IV. The Maryland Sunday Blue Laws applicable to Anne Arundel County violate the guarantee of freedom of religion contained in the 1st and 14th Amendments of the Constitution of the United States.

## STATUTES INVOLVED

Art. 27, sec. 492.

Art. 27, sec. 521.

Art. 27, sec. 522.

Art. 27, sec. 509.

Art. 2B, sec. 2B.01.

Code of Public Local Laws of Anne Arundel County

Flack, 1947, secs. 394-395.

Resolutions of County Commissioners of Anne Arundel County:

March 11, 1957

Oct. 7, 1958.

Article 19, Constitution of Md.

Article 23, Constitution of Md.

**STATEMENT OF THE CASE**

These appeals are from convictions by the Circuit Court of Anne Arundel County on October 28, 1958, in seven Sunday "Blue Law" cases, which were consolidated and tried before the Court without a Jury.

The Appellants, who were fined \$5.00 and costs were employees of a company known as "Two Guys from Harrison", which about 10 days before the arrests made in these cases, opened a general merchandising store on Ritchie Highway in the Glen Burnie area of Anne Arundel County. The Appellants were convicted of making sales on Sunday, September 28, 1958, in violation of section 521 of Article 27 of the Maryland Annotated Code, which prohibits the sale of merchandise, with certain stated exceptions on Sunday. The Appellants, McGowan and Joswiak, were convicted of selling a three-ring loose-leaf binder and a can of Simoniz Floor Wax. The Appellants, Hopper, Shifflett, Schepps and Mayers were convicted of selling a stapler and staples. The Appellant Sawyer was convicted of selling a toy submarine.

## ARGUMENT

1. THE SUNDAY BLUE LAWS APPLICABLE TO ANNE ARUNDEL COUNTY ARE UNCONSTITUTIONAL IN THAT THEY CONTRAVENE THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLES 19 AND 23 OF THE MARYLAND DECLARATION OF RIGHTS BECAUSE THEY EMBODY ARBITRARY AND CAPRICIOUS CLASSIFICATIONS WHICH UNLAWFULLY DISCRIMINATE IN FAVOR OF CERTAIN SALES AND AGAINST OTHERS.

Maryland's first Blue Law of 1692-1715 enacted under a lord proprietor of the colony forbade anyone to do any bodily labor or occupation upon the Lord's Day commonly called Sunday, works of absolute necessity and mercy excepted. This statute changed slightly in 1723, and 1920, has substantially its original form, and is now codified as Article 27, section 492. The statute was said not to infringe the constitutional guarantee of religious freedom in a long dictum in the old case of *Judefind v. State*, 78 Md. 510 (1894), in which the Court held that the defendant could properly be convicted under the statute for husking corn on Sunday. The dictum in the *Judefind* case was re-affirmed in *Levering v. Williams*, 134 Md. 48, which struck down an attempt by Baltimore City to permit professional baseball on Sunday as being in conflict with the general statute prohibiting all bodily labor on Sunday except works of charity and necessity, which the Court held was constitutional.

However, the instant prosecutions under which Margaret M. McGowan, et al., were convicted were not brought under the general Sunday bodily labor statute before the court in the *Judefind* and *Levering* cases, but under Article 27, section 521 specifically dealing with Sunday sales.

Purporting to be applicable throughout the State, this law provides that no person in the State may sell, dispose

of barter, deal in or give any article of merchandise on Sunday with the following stated exceptions: Retailers may sell and deliver tobacco, cigars, cigarettes, candies, sodas, soft drinks, ice, ice cream, ices, and other confections, milk, bread, fruits, gasoline, oil and grease, and the statute also exempts periodicals, newspapers and apothecaries. However, Article 27, section 521 is not the only statutory provision respecting Sunday sales in Anne Arundel County. In 1941, the Legislature passed section 509 of Article 27 which repeals both section 492 and section 521 (as well as section 522) another law which on its face is generally applicable throughout the State so far as applicable to Anne Arundel County to the extent that the earlier statutes prohibit the operating on Sunday of any bathing beach, bathhouse, amusement park, dancing saloon, picnic groves, amusement rides, amusement devices, entertainments, shows, or the leasing or renting of boats, tables, chairs, or beach umbrellas. Section 509 also specifically permits, in the disjunctive, the sale or selling at retail of any merchandise essential to or customarily sold at or incidental to the operation of these occupations or business. In addition Article 2B of the Code as enacted in 1933 and 1935, permitted the holders of beer licenses in Anne Arundel County to sell beer on Sunday; and in *Anne Arundel County v. Thomas*, 172 Md. 18, the Maryland Court of Appeals held that the operator of a tavern was entitled to an injunction against the enforcement of the Sunday Blue Laws on the ground that permission to sell beer on Sunday in Anne Arundel County granted by the State Alcoholic Beverage Statute superseded the prohibition of such sales theretofore contained in what is now section 521 of Article 27. At present Article 2B, section 28, provides for the right of numerous licensees, in Anne Arundel County, including general taverns with or without musical entertainment to sell on Sunday not only beer but all kinds of alcoholic

beverages. Finally, by chapter 321 of Acts of 1943 sections 383 and 384 of the Code of Public Local Laws of Anne Arundel County, slot machines, pin-ball machines, and bingo in that county were legalized and are freely played on Sunday, being exempt from the Blue Laws.

The appellants were convicted of selling on Sunday, September 28, 1958, a 3-ring loose leaf, a can of Simoniz, stapler and staples and a toy submarine. Anne Arundel County, possessing many beach and shore resorts, several within the immediate area of the "Two Guys from Harrison" Store, allows ostensibly the sale of some of these items under Article 27, section 509, pertaining to beaches, amusement park, etc. The law on Sunday sales in Anne Arundel County is thus challenged upon the ground that it is special or class legislation. The law does not extend to the sale of all classes of merchandise or all vocations. The exempted items in the statute are neither necessary nor charitable. The law although purporting to be general in the sense that it affects alike all engaged in the business of selling general merchandise, lacks the element of uniformity in the legal meaning of that term because it imposes upon them restrictions. It was stated in *The City of Denver v. Bach*, 26 Col. 530 (1899) p. 533.

It certainly cannot be of any benefit to either the welfare or good government of the city, to limit the exercise of a common right to engage in the business of merchandising in the city, by arbitrarily imposing upon dealers in certain articles disabilities upon Sunday, and yet allow others, who happen to be engaged in a business or avocation of a different character, neither necessary nor charitable, to continue it upon that day, although the effect upon the public generally, by permitting such business or avocations to be carried on would be the same as would result from the carrying on of business on Sunday by those prohibited from so doing.

The appellants are deprived of due process of law because the Sunday Blue Laws discriminate between different kinds of commodities. This contention has been raised in many cases, and although usually denied, has been sustained in others.<sup>2</sup>

Maryland has held in *Ness v. Supervisors*, 1832, 362 Md. 529, 160 A. 2d that a City ordinance permitting specified amusements, games and sports for profit after 2:00 P.M. on Sunday and allowing these, and others, if not for profit, at any time on Sundays, and also permitting retail sales on Sunday within restrictions not to involve such discrimination between activities permitted and not permitted as to violate the Fourteenth Amendment to the United States Constitution and the Maryland Declaration of Rights. Nevertheless, a municipal ordinance prohibiting the sale of commodities on Sunday with certain exceptions was held invalid and unconstitutional in *Gronlund v. Salt Lake City*, (1948), 113 Utah 284, 194 P. 2d 464, where it appeared that the ordinance provided that it should be unlawful to offer or expose for sale or sell on Sunday "any commodity" except that various items were exempted from the operation of the ordinance. The Court stated that "Even bearing in mind the rule that the classification upon which a Sunday closing law is based is within the discretion of the legislative branch and hence will be upheld unless clearly arbitrary, it is difficult to conceive of a fair reason for some

<sup>2</sup> 57 A.L.R. 2d footnote 1, page 982, and cases cited.

<sup>1</sup> *Juster's Food Stores v. State*, (1938), 12 Cal. 2d 324, 37 P. 2d 447, 17 N.R. 2d 52; *Allen v. Colorado Springs*, 101 Colo. 408, 75 P. 2d 141; *Goetz v. Board of Supervisors*, 208 Cal. 720, 284 P. 654.

<sup>2</sup> Sunday ordinances must be based on a reasonable classification and an ordinance prohibiting the sale of a commodity is not discriminatory against particular dealers who are licensed to sell the same commodity as all other dealers in the commodity. 31 C.O.C. 112.

of the items except from the present ordinance, there being no reason why certain commodities should be sold, while others of equal usefulness should be prohibited from being sold. In this regard the court said that it was

"... arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or a can of coffee." 194 P. 2d 468.

The Supreme Court of the United States in *Old Dearborne Distributing Co. v. Seagrams Distillery Corp.*, 299 U.S. 183 stated, in order to be held constitutional, a classification must not only be reasonable and not arbitrary but must rest upon a difference having a fair and substantial relation to the object of the legislation. *Colgate v. Henry*; 296 U.S. 404, 56 S. Ct. 253. In *Anderson v. Antonacci*, 62 So. 25, the Florida Court invalidated a general Sunday law which expressly exempted newspapers, theatres, filling stations, restaurants, grocery and drug stores, hotels, parking lots and transportation companies, but not automobile dealers and garages. In the *City of Denver v. Bach* (1899), 26 Col. 530; 58 P. 1089, the Supreme Court of Colorado held an ordinance unconstitutional as a class legislation prohibited by the Colorado Constitution. Likewise, in *Mergren v. Denver*, 104 P. 395, 46 Colo. 85, the same court invalidated a law precluding Sunday sale of meats and groceries as unconstitutional. In dealing with the general principles of Sunday sales to specific Sunday sales statutes, it is to be noted in the editorial comment in 57 A.L.R. 2d 975, section 1 (Sunday Law—Discrimination [b] Summary and analysis, pp. 978-80), that the weight of authority with regard to Sunday sales statutes cannot validly be determined by comparing the number of cases in which Sunday sales statutes have been sustained with the number in which they have been struck down, but the constitutional question in any case can be decided only "in connection with the particular



Sunday Law in question" 57 A.L.R. 2d 978. Also it is to be mentioned that the tendency in the more recent cases is to be less indulgent in viewing the statutory distinctions than were the earlier cases. This stricter attitude seems in part to be due to a change in public values and sentiments regarding Sunday, resulting from the spread of suburban liv-

\* Note: *Syracuse Law Review* 6:362 — 1954-1955.

"... The original emphasis of the laws, in accord with early English and American thought, was largely to influence and control the religious and moral character of the population." (The spirit of the act (29 Car. 1. 18C7) is to advance the interests of religion to turn a man's thoughts from his worldly concerns and to direct them to the duties of piety and religion). *Fennell v. Ridler*, 8 D. & R. 204, 168 Eng. Rep. 151, 152 (1826). Time and changing social patterns resulted in the relaxation of this politically "coerced morality". Emphasis gradually shifted towards protecting from disturbance those who held Sunday to be sacred.

In 1953, a New York Court held commercial washing of cars on Sunday not a violation of law because the operation did not seriously interrupt the repose and religious liberty of the community. *People v. Helton*, 119 N.Y.S. 2d 692.

"However necessary and natural Sunday Laws may be in terms of man's physical and spiritual needs, they must keep pace with the times."

*Boston Law Review* 39:543 *A General Survey of the Sunday and Holiday Laws in New England*.

"The purpose of the early Sunday laws was essentially to provide for the proper observance of the Sabbath. Obviously, today, such a basis for a law might raise serious constitutional objections. The most recent rationale which has been advanced to justify the law is the contention that its purpose is to establish a day of rest in accordance with a state's police power to provide for the health and welfare of its citizens. Such a theory had particular significance during this nation's period of industrial advancement when laborers were at a bargaining disadvantage in respect to management. However at present, there is a question as to whether the Sunday and Holiday 'closing' laws are necessary, or even desirable. . . ."

Volume 2 — Attorney General's Opinions State of Maryland (1917). Albert C. Ritchie stated, as to whether newspapers are goods, wares and merchandise within meaning of the term as used in the statute that in view of progress of newspaper and its character and influence, newspaper sales of Sunday not prohibited.

As to the right of the owner of Riverview Park to maintain a lunch, sell soft drinks, ice-cream, etc., operate gravity railway, canal, ferris wheel and other amusements on Sunday, on March 3, 1919, Albert C. Ritchie, Attorney General, advised the Secretary of the

ing and also from an increased awareness on the part of the courts that the growing number of exemptions and *ad hoc* distinctions which have corroded the original purpose and design of the Sunday statutes is not so much the result of legislative classification based on intuitions of public policy as it is of effective lobbying on the part of numerous particular interests which have succeeded in destroying all semblance of rational purpose underlying the pattern and structure of Sunday legislation.

The more recent attitude towards the Sunday Blue Laws is well summarized in Editorial Note, *Sunday Blue Laws: An Analysis of Their Position in Our Society*, 42 Rutgers Law Review 505 (1958). The note points out that the rea-

Board of County Commissioners that the amusements on Sunday afford healthy recreation from work and welcome relief from summer heat to thousands of people.

December 2, 1920, Attorney General Alexander Armstrong in a letter to General Charles D. Gaither, Police Commissioner, Court House, Baltimore, Maryland:

"There are decisions of an earlier period in other States which hold that it is unlawful to publish a newspaper on Sunday, to sell a newspaper on Sunday and to operate a steam train on Sunday but I cannot believe that those acts would now be considered violations of the Sunday laws. *The complexity of our modern life has presented new living conditions whose requirements have led to a more liberal construction and application of these restricting measures.* (Emphasis supplied.) If they were given a literal interpretation it would be illegal for churches to maintain paid choirs. The church member who is driven to service by his paid chauffeur would be a violator of the law, and many other acts now sanctioned by public approval, would formerly be declared improper, and even at this time, by rigid construction, might be considered to be embraced within the operation of these statutes."

In a letter to Charles D. Gaither, Police Commissioner, the Attorney General stated:

By a strict interpretation of Section 483, Art. 27 it would be illegal to employ on Sunday domestic servants for household duties, chauffeurs for the operation of automobiles, musicians for playing in a municipal band, organists and members of choirs in churches where such persons are paid for their services. All these modes of employment on Sunday have been permitted for a long period of time without objection notwithstanding provisions of law above referred to.

sons for the recent spurt in Blue Law litigation include the five day week, the days off other than Sunday, the recent spread of population to the suburbs, the consequent increase in the number of people who spend at least part of Sunday in their automobiles, the decline and relative inconvenience of urban shopping centers, and the growth of the custom on the part of many people to combine the Sunday family drive with family shopping at a convenient location where and when all the members of the family can be together. In this context the note points out:

"Thus, the Sunday blue laws often remain unenforced until some private group agitates against certain individual interests which they oppose. This inevitably leads to discriminatory enforcement. As a result of this, the blue law becomes a weapon in an economic struggle, a use scarcely conceived by the originators of this type of legislation . . ." 12 Rutgers Law Review 508.

"The state statutes have evidenced a wide variety of unexplainable and irreconcilable classifications and exceptions. The only possible explanation seems to lie in the ability of the various pressure groups to have their desires solidified into legislation . . ." 12 Rutgers Law Review 511.

"The only legitimate ends which the Sunday laws allegedly achieve are the procurement of a day of rest for the public and the encouragement of worship on Sundays." 12 Rutgers Law Review 513.

The court (considering the validity of a Sunday law) can, however, render valuable aid against the other chief evil of the blue laws: discrimination. To the present, the courts have not been very effective in preventing this, mainly because of the utilization of the doctrine of judicial self-restraint. The rationale behind judicial self-restraint is that it is the job of the legislature to protect the health of the community, and if it is necessary to make some work

illegal on Sunday to effectuate this end the court will not interfere because the Legislature has sworn to uphold the constitution just as the courts have, and moreover, the Legislature is deemed more competent in this sphere because of its access to statistics and the availability of experts to aid it in determining which groups most need a day of rest.

The need for this type of judicial restraint was pointed up dramatically in the thirties and the rationale has much worth. But, it is only valid when the major premise is a reality; that is, when the Legislature does have better sources than the court to determine what classification should be made and when it has in fact used these sources as the basis for the classifications found in the statute. In regard to the Sunday laws it is probable that the Legislature with its resources is in a better position to determine what is best for the health of the community, but the statutes and their history seem to indicate that it is not the legislative materials but rather the pressure groups which dictate the classifications. 12 Rutgers Law Review 518.

There are very few cases specifically dealing with Sunday sales statutes closely resembling the pattern applicable to Anne Arundel County, possibly, no doubt, because there are very few Legislatures which have gone to the extent of passing quite such statutes. The cases which have discussed such statutes have held the statutes to be invalid. The case most closely in point which counsel have found is *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P. 2d 464. The statute in that case was somewhat less vulnerable than the statutes in the case at bar, but it shared one important feature of the Anne Arundel County statutes, namely an exception in favor of the sale of beer on Sunday. The Utah court in an earlier case, *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939, pointed out that statutes regulating the com-

modities which may be sold on Sunday had almost uniformly been upheld and that "The courts point out that any one can sell any one of the exempted commodities and that there is, therefore, no discrimination as long as the legislature stays within proper limits in providing for exceptions" (140 P. 2d 944 quoted at 194 P. 2d 467). The Court also gave full effect to the rule that the ordinance in question was presumably constitutional and that discrimination is the essence of classification and is not objectionable unless founded upon differences which the court is compelled to find arbitrary and unreasonable, citing 12 Am. Jur. *Constitutional Law*, sec. 521, p. 217 to the effect that "Before a court can interfere with the legislative judgment it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others which it leaves untouched". 194 P. 2d 466.

Giving full weight to these considerations, the court nevertheless held as follows:

"While the ordinance does not expressly prohibit the carrying on of businesses of a particular type, we cannot close our eyes to the fact that its necessary effect is to do so. A clothing, hardware, or jewelry store does not engage in selling any of the excepted products, nor would it be economically feasible for a large grocery or vegetable store to open its doors on Sunday for the sale of milk, tobacco, and candy . . ." (194 P. 2d 467).

"The principal attack upon the ordinance in question in the brief and argument on behalf of appellant is directed at the exceptions in the enactment from the general prohibition against sale and offering for sale of commodities on Sunday . . . Even bearing in mind the rule that the classification upon which a Sunday law is based is within the discretion of the legislative branch and hence will be upheld unless clearly arbitrary, it is difficult to conceive of a fair reason

for some of the items excepted. It is readily apparent that some of the exceptions are clearly based on necessity. But as to others, even considering the desirability of promoting recreational activity on Sunday, no fair reason suggests itself as to why their sale should be permitted on Sunday while the sale of other commodities is prohibited. . . . *The classification being on a commodity basis, it is arbitrary to permit the sale of a can of beer on Sunday and prohibit the sale of a can of orange juice or a can of coffee.* (Emphasis supplied). 194 P. 2d 468.

Again in *Deese v. Lodi*, 21 Cal. App. 2d 631, 69 P. 2d 1005, the ordinance permitted the following establishments to be exempt from the operation of the general Sunday law among others: taverns, places where liquid beverages are sold, pool or billiard halls and skating rinks. The court held that this was an unconstitutional discrimination against the proprietor of a grocery store. The court said:

“ . . . just how the conduct of a grocery store in the City of Lodi is more inimical to the cleanliness, orderliness, and the public health of the City of Lodi than . . . a beverage establishment [such as are conducted under various euphemistic names but . . . in fact saloons] is difficult to perceive. . . .

“ We think it unquestionable that the closing of grocery stores and fruit stands on Sunday, and the leaving open . . . [of the exempted establishments] is . . . discriminatory . . . We may add what we know is common knowledge, that such excepted places are the very places where acts of disorderliness do occur, are expected to occur, and are of common occurrence. . . . In other words, the Lodi ordinance has neither morals, Christian observance of Sunday, public health, welfare, or safety to support it, in that it specifically excludes a long line of occupations, businesses, or whatever they may be called where everything contrary to good morals, Christian observance of Sunday, safety, or public welfare may be found . . . We do not see any escape from the foregoing that Ordinance Number 220



of the City of Lodi is not an ordinance calculated to promote the public health, morals, safety, welfare, clearness, or orderliness, much less the Christian observance as the day of rest of any particular day, and is arbitrary in its classifications and discriminatory in its attempted application, and is therefore void." 69 P. 2d 1009-1011. (Emphasis supplied.)

The cases upholding statutes and ordinances which exempt certain types of commodities—generally similar to the exemptions contained in Section 521 of the Maryland law but quite dissimilar to the pattern present in this case—taken as a whole, often go out of the way to point out, as in *Hoffman v. Justus*, 91 Minn. 447, 98 N.W. 325, in support of the distinctions made in a particular statute, that "the statute clearly prohibits the sale of intoxicating drinks in any form on Sunday . . ." 98 N.W. 326.

In the instant case the statutory pattern permits what Judge Mason in *State v. Fearson*, 2 Md. 310, 313 (which affirmed a conviction for permitting persons to bet on cards on Sunday) characterized "independent of any statutory prohibition" as "a gross offense against decency and public morals" which "richly merits punishment". In the instant case, the court below admitted that the distinctions made in the Anne Arundel statutes are "ridiculous" (Transcript p. 83). When the statutory distinctions get to this point it is the court's duty to declare the statute invalid, and the court below erred in allowing a statutory pattern embodying such distinctions to stand. The sale of intoxicants, the opening of general taverns on Sunday, and various forms of gambling have been generally regarded as *par excellence* the very type of violations of the purposes of the Sunday laws which makes such laws reasonable, to the extent that some statutes impose greater penalties upon sellers of intoxicants than upon those who violate the Sunday sales laws generally. See Note, 8 A.L.R. 567. To permit the sale



of intoxicants and the operation of slot machines, pinball machines and bingo on Sunday, as well as the other exceptions which the statutes here in question permit, is to do what the court condemned in *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939, 946 where the court said:

"The exceptions in the Utah Sunday closing statutes are so broad that they in effect change the nature of this act from a general closing law, with exceptions, to a law aimed, without sufficient legal reason, at certain classes of businesses with a general exception to other classes which in effect is a grant of a special privilege to the excepted class while without legal excuse denying them to others."

It is one thing to uphold a pattern of Sunday laws which is not perfectly symmetrical, or in which "there are discriminations which cannot be explained or justified by reasons," and quite another thing to uphold, as the trial court did, Sunday legislation whose admittedly "ridiculous" classifications expressly permit the kinds of sales and activities which are the very antithesis of the spirit of Sunday observance and prohibit sales and conduct which by any test are incomparably more innocuous than the sales and activities permitted:

**II. THE LEGISLATURE IN ITS ENACTMENT OF THE LAW HAS DEPRIVED CITIZENS OF ONE PART OF THE STATE OF THE RIGHTS AND PRIVILEGES WHICH THEY ENJOY IN COMMON WITH THE CITIZENS OF ALL OTHER PARTS OF THE STATE CONSTITUTING CLASSIFICATION LEGISLATION FOR ANNE ARUNDEL COUNTY MAKING CERTAIN SUNDAY SALES A CRIME.**

This law allowing sales of goods in one area and prohibiting them in another is purely directed to a particular

Article 27, Section 500 — Beaches, Amusement Parks, Picnic Groves, Etc, in Anne Arundel County.

It shall be lawful to operate, work at, or be employed in the occupations of operating any bathing beach, bathhouse, amusement park,

class of merchants and exempts others without any substantial reason behind it as to why it is made to operate upon them and not generally upon all dealers in merchandise or all vocations. It compels certain merchants to refrain from doing business on Sunday and yet allows their neighbors and competitors engaged in the sale of articles permitted under section 509, article 27, a privilege which they are denied. Sunday Law prohibiting the operation of stores with a number of specific exceptions, has been held unreasonable and discriminatory."

dancing saloon, the sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses, at retail, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows and the hiring or renting of boats, tables, chairs, beach umbrellas, on the first day of the week commonly called Sunday, within Anne Arundel County, and 492, 521, and 522 of this article are repealed, in so far and to the extent that they prohibit the operating of and/or the working of or employment of persons in the operation of any bathing beach, bathhouse, amusement park, dancing saloon, the sale or selling at retail of any merchandise, essential to or customarily sold or incidental to the operation of the aforesaid occupations or business, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows and the hiring and renting of boats, tables, chairs, beach umbrellas, on the first day of the week commonly called Sunday, in Anne Arundel County.

*Elliott v. State*, (1926), 29 Ariz. 389, 342 P. 340, 46 A.L.R. 284; *Ex Parte Westerfield* (1880), 55 Cal. 550, 36 Am. Rep. 47; *Gustano Bucci & Sons v. Latendale* (1939), 208 Cal. 720, 284 P. 654; *Justesen's Food Stores v. Tulare* (1938), 12 Cal. 2d 324; *Deese v. Lodi* (1937), 21 Cal. App. 2d 631, 69 P. 2d 1005; *Denver v. Bach* (1899), 26 Colo. 539, 58 P. 1089; *Morgan v. Denver* (1909), 36 Colo. 385, 104 P. 399; *Allen v. Colorado Springs* (1937), 101 Colo. 498, 75 P. 2d 141; *Henderson v. Antonacci*, (1952), 62 So. 2d 6; *Mt. Vernon v. Julian* (1938), 369 Ill. 447, 47 N.E. 2d 52, 119 A.L.R. 747; *McKaig v. Kansas City* (1953), 363 Mo. 1033, 256 S.W. 2d 845; overruling *St. Louis v. DeLassus* (1907), 205 Mo. 578, 104 S.W. 12; *Arriaga v. Lincoln* (1951), 154 Neb. 537, 48 N.W. 2d 643; *Cowan v. Buffalo* (1935), 157 Misc. 71, 282 N.Y. 5880; *State v. Blackwell* (North Carolina) (1928), 186 N.C. 561, 120 S.E. 196; *Ex Parte Ferguson* (1937), 62 Okla. Crim. 145, 70 P. 2d 1094.

The case at bar may be distinguished from *Re Sumida* (1918), 177 Cal. 388. In that case the Court held the exclusion of the businesses namely hotels, boarding houses, lodging houses, restaurants, bakeries, etc. did not make the ordinance invalid since there appeared to be a well-founded distinction between the two classes of business, one of which was allowed to keep open, and the other was required to close on Sunday since there was an element of necessity in regard to those which were allowed to keep open.

In the case at bar, there can not under any sense of the word be a necessity in selling "novelties, souvenirs, accessories or other merchandise essential to or customarily sold at, or incidental to the operation of the aforesaid occupations and business. . . ." Assuming the reasoning of *Mt. Vernon v. Julian* (1938), 369 Ill. 447, 17 N.E. 2d 52, 100 A.L.R. 747, to be applicable, there appears to be no reason why a dressmaker's shop should be open while a cigar store should be required to close, nor why a dry good store should be required to close while a news stand continued to operate. The Court went on to say that the distinctions

*Broadbent v. Gibson* (1943), 105 Utah 53, 140 P. 2d 939; *Gronlund v. Salt Lake City* (1948), 113 Utah 284, 194 P. 2d 464.

Laws such as these have been invalidated in cases listed below:

*Hot Springs v. Gray* (1949), 215 Ark. 243, 219 S.W. 2d 930; *Theisen v. McDavid* (1894), 34 Fla. 440, 16 So. 321, 26 L.R.A. 234; *Lo Tempid v. Niagara Falls* (1938), 166 Misc. 338; *Ex Parte Peterson* (1937), 62 Okla. Crim. 145, 70 P. 2d 1024; *Ex Parte Hodges*, 65 Okla. Crim. 69, 83 P. 2d 201.

Judge Michaelson, Nisi Prius Judge, stated in his remarks (pp. 83-84 of Transcript of Record):

"We're living in a complex age, things are moving at a rapid pace. In certain sections of our state and certain sections of the country you have still a puritanical approach to certain things that go on on Sundays; in other sections you have a more liberal approach, you might say, in the vernacular, this is an unpopular law, enforcing this law this way, we don't think it ought to be the law and you can criticize it in more ways than one. One comment of which we were all

between those businesses required to remain closed and those allowed to open appeared to be entirely arbitrary without relation to public health, safety, morals or welfare. In *Allen v. Colorado Springs* (1937), 101 Colo. 498; 75 P. 2d 141, holding an ordinance invalid, the court observed that the ordinance thereby created a condition in which it was perfectly lawful for a retail drugstore on Sunday to sell staple groceries, while the same ordinance prohibited a grocery store operator from selling the identical items. The discrimination between grocery stores and other businesses created by the ordinance was held to make the ordinance invalid. The Court in *Ex Parte Hodges* (1938), 65 Okla. Crim. 69, 83 P. 2d 201, holding invalid an ordinance, stated at p. 204:

The language of the ordinance shows it is not a general Sunday closing ordinance but a special one directly aimed without any apparent legal reason at certain classes of business with a general exception to another class and does therefore in effect grant special privileges and immunities to certain classes of business with a general exception to another class and does therefore in effect grant special privileges and immunities to certain classes of business while without legal excuse denying them to others."

Thus the question is raised as to whether Article 27, section 509, purporting to be a State-wide law is unconstitutional on the basis that the Legislature has attempted to deprive citizens of one part of the State of the rights and

cognizance [sic] was mentioned this morning, that it seems to be ridiculous that you can buy beer and whiskey on Sunday and yet unfortunately, if you had to attend a wedding or a reception or a dinner and opened up your bedroom drawer and found out you didn't have an undershirt because maybe some mice had gotten in there and eaten up the last one you had and you had to run around the corner and get one, so you'd be dressed for the party or occasion why, that's against the law now, and the Almighty is going to send you to eternal damnation because you go out and buy an undershirt under all the conditions."

privileges which they enjoy in common with the citizens of all other parts of the State.

C. Ferdinand Sybert, Attorney-General of the State of Maryland, commenting on House Bill No. 265 on April 30, 1959, stated:

"Similarly, the lack of any apparent basis for the exclusion of certain counties from a State-wide regulatory policy which would appear to be equally applicable to them may well make the bill discriminatory legislation in violation of Article 23 of the Declaration of Rights. The power of the Legislature to restrict the application of statutes to localities less in extent than the entire State is not unlimited; it cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, unless there is some difference between the conditions in the territory selected and in the conditions in the territory not affected by the statute sufficient to afford some basis, however slight, for classification. *Maryland Coal & Realty Co. v. Bureau of Mines*, 193 Md. 627, 642 (1949)."  
69 A. 2d 471.

In the latter case referred to, the Maryland Court of Appeals stated at 69 A. 2d 477:

"But it is equally clear that the power of the Legislature to restrict the application of statutes to localities less in extent than the State, as the exigencies of the several parts of the State may require, cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State, unless there is some difference between the conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, however slight, for classification. *Dasch v. Jackson*, 170 Md. 251, 270, 133 A. 534."

III. THEY ARE ARBITRARILY DISCRIMINATORY AND SO VAGUE AS TO FAIL TO GIVE REASONABLE NOTICE OF THE CONDUCT INTENDED TO BE PROHIBITED THEREBY.

Art. 27, Section 521, under which the appellants were convicted, and Art. 27, Section 509, which carves out certain exceptions, must be read together. Section 509 expressly permits certain Sunday sales in Anne Arundel County and removes such sales from the ban of Section 521. Section 509 permits "the sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, bath houses, amusement parks or dancing saloons". The permission of sales is a separate clause of the statute, and there is nothing in this clause which requires that the sales be made on the premises of a bathing beach, bath house, amusement park or dancing saloon. The statute permits the sale of merchandise which is essential to or customarily sold at or incidental to the operation of these occupations. The statute is a statute applicable throughout Anne Arundel County generally; and permits the sale of certain commodities described therein. It is not to be lightly inferred that the Legislature would have permitted sales in a dancing saloon of the same articles which it prohibited elsewhere, and indeed such a statute, which permits one type of outlet to sell the same commodities which it prohibits another outlet from selling, has generally been held unconstitutional. See *Mt. Vernon v. Julian*, 369 Ill. 447, 17 N.E. 2d 52; *Allen v. Colo. Springs*, 101 Colo. 498, 75 P. 2d 141; *Elliott v. State*, 29 Ariz. 389, 242 Pac. 340; *Arrigo v. Lincoln*, 154 Nebr. 537, 48 N.W. 2d 643.

\* The permission is also phrased in sec. 509 as including "the sale or selling at retail of any merchandise, essential to or customarily sold or incidental to the operation of the aforesaid occupations or business."



The court below apparently took the view that under Section 509 the types of merchandise specified therein as permissible for Sunday sales could be sold only at the premises housing the operation which the statute permits. The Legislature, however, did not say this, and it requires a forcing of statutory language to reach this result. Penal statutes are, of course, strictly construed, and held in their application to what the Legislature actually said. The words of the statute in their plain meaning are inconsistent with the interpretation by the trial court. Appellants' contention is fortified by the terms of Art. 27, sec. 506, relating to Montgomery County, where the Legislature, when it wished to limit the exceptions to the premises of amusement parks etc. clearly provided that such exceptions were to be "within the confines" of the premises enumerated in the statute.

"Section 509 is extremely vague. In order to determine whether merchandise is customarily sold at bathing beaches, bath houses, amusement parks, and dancing saloons, a merchant would be required to make a market survey before he could act with confidence, and even then, in view of the shifting patterns of merchandise, particular types of establishments are no longer limited in the lines they carry. It is common knowledge that what once used to be drug stores and food stores are now in effect department stores. Moreover, if merchandise is sold at one-third of the bathing beaches or dancing saloons in Anne Arundel County, does it qualify as being customarily sold at such places? If all of the dancing saloons or bathing beaches in Anne Arundel County should get together and institute a complete variety of new lines and products, would such products be "customarily sold" at bathing beaches and dancing saloons? In any event, even if section 509 means what the court below said it means, the fact that it gives so much



leeway to the operators of the permitted establishments in the sale of merchandise on Sunday, apart from the question of vagueness, aggravates the discriminatory character of the legislative pattern, and reinforces appellants' argument on this point.

**IV. THE MARYLAND SUNDAY BLUE LAWS APPLICABLE TO ANNE ARUNDEL COUNTY VIOLATE THE GUARANTEE OF FREEDOM OF RELIGION CONTAINED IN THE 1st AND 14th AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.**

The Appellants in the case at bar contend that the Sunday closing Law applicable to Anne Arundel County is in violation of the guarantee of freedom of religion. The Supreme Court of the United States in *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947), declared:

"The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

*University of Pittsburgh Law Review* Vol. 1, p. 123 stated:

"The Court further classified this freedom in stating that 'State power is no more to be used so as to handicap religions than it is to favor them.' The freedom-of-religion provisions of the First Amendment have been incorporated in the due-process clause of the Fourteenth Amendment and thus are binding on the States. Therefore it is clear that the federal constitution precludes the states from preferring or protecting one religion above all others. This is demonstrated by the statement of Chief Justice Vanderbilt that: 'the state or any instrumentality thereof cannot under any circumstances show a preference for one religion over another. Such favoritism cannot be tolerated and must be disapproved as a clear violation of the Bill of Rights of our Constitution.' *Tudor v. Board of Educa-*

tion, 14 N.J. 31, 100 A. 2d 857, 864-865 (1953). The clause against the establishment of religion by law was intended to erect "a wall of separation between church and State." *Reynolds v. U. S.* (1878), 98 U.S. 145, 164.

The very wording of the Maryland statute indicates the religious nature of the statute. Since colonial times, Christianity has been advanced by the State Legislature and Sunday observance has been decreed as mandatory."

"Sunday, or the Sabbath, was not a day for recreation in early Maryland. Under the Roman Catholic proprietors, rigid views were held about the observance of this day. By the Terms of the Toleration Act of 1649<sup>10</sup> any one was fined who profaned 'The Sabbath, or Lord's Day, Called Sunday, by frequent swearing, drunkenness, or by any unclean [sic] or disorderly recreation, or by working on that day when absolute necessity doth not require it'.

Several years after this, an act was passed which forbade any one to hunt or shoot a gun on Sunday. About 25

<sup>9</sup> Article 27, Sec. 492 — Working on Sunday; Permitting Children or Servants to Game, Fish, Hunt, Etc.

No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation; and every person transgressing this section and being hereof convicted, before a justice of the peace shall forfeit five dollars, to be applied to the use of the county.

The First day of the week, known as the "Lord's Day," commemorates the Resurrection of Jesus Christ, and is indisputably Christological in its inception and in its essential character to this day. 1959 Ed., Encyclopaedia Britannica, Vol. 21, p. 565.

<sup>10</sup> Under 1649 — Toleration Act — there was no toleration for Jews. Persons who blasphemed or cursed God or denied that Jesus Christ was the Son of God or denied the Holy Trinity, or even used reproachful words about the Holy Trinity, could be put to death and their possessions confiscated. Nor could one make any reproachful

years later another law was passed "for keeping holy the Lord's Day". Members of the assembly thought that the new statute was necessary, since the day was being profaned.

Henry Clay was presented in Kent County "for striking tobacco on the Sabbath Day," and Captain John Russell for fighting.

The Maryland Court of Appeals in *Judefnd v. State*, 78 Md. 510, at 515, stated:

"It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian Religion — of all sects and denominations that observe that day — as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. If the Christian Religion is, incidentally or otherwise, benefited or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it . . ."

remarks about the Virgin Mary, or the apostles or evangelists without being fined, or whipped or imprisoned.

*Case of Jacob Lumbrozo*, 1658 Catholic Colonial Md. Spalding — Bruce Pub. Co. "It would appear that a few Jews were resident in Maryland from the earliest days of the colony."

Originally enacted 1692-1715, Maryland's First Blue Law forbade anyone to do bodily labor or occupation upon the Lord's Day commonly called Sunday. *Liberty Magazine* XXVL-2-1931.

It is ironical that it is a matter of history that the State of Maryland was colonized by men who fled from ecclesiastical oppression, that they might enjoy liberty of conscience.

*Citizenship and Suffrage in Maryland* — Steiner (1936).

P. 33. The Jews had been prohibited from political privileges by the provision in the Constitution requiring the profession of the Christian Religion. In 1797 the first movement was made to free them from this restriction, but not until 1818 was a determined attempt made. In 1825 and 1826 the Constitution was amended and then Jews given same privileges as Christians.

A consequence of abridging the freedom to practice one religion is to a certain extent to aid — and therefore establish — another. Conversely, a consequence of establishing one religion is to induce the adherents of another to break their ties.

In the case of *Kilgour v. Miles*, recorded in 1834 in 6 Gill and Johnson 268 at 274, the Court said:

“... The Sabbath is emphatically the day of rest, and the day of rest here is the ‘Lord’s Day’ or Christians’ Sunday. Ours is a Christian community, and a day set apart as a day of rest, is the day consecrated by the resurrection of our Saviour, and embraces the twenty-four hours next ensuing the midnight of Saturday. But without relying on the plea for the appropriate appellation of the day, or for any other aid, we think there is no difficulty, and the defendant might safely have demurred according to the doctrine of the case of *Hoyle v. Ld. Cornwallis*. . . .”

In the case of *District of Columbia v. Robinson*, District Court of Appeals, 30 App. Cas. (D.C.) 283, the crux of the decision was that it is mandatory upon all citizens to acknowledge Sunday as a day of rest. It is respectfully submitted that such an interpretation has the effect of compelling many to observe two days of rest in each week: the statutory day and the day which their religious faith constrains them to observe.

“Members of those faiths which observe a day other than Sunday are curtailed in their activity to a greater extent than their fellow citizens. On both Saturday and Sunday, for example, Orthodox Jews and Seventh Day Adventists can neither operate business establishments nor purchase certain goods. If recreational activity is unlawful on Sunday and prohibited by their religion on another day, Sabbatarians must find their recreation on the five days usually devoted to work. Moreover, recognition by the secular authorities of the

special character of the majority's holy day may cause this minority to feel foreign and inferior. These economic and psychological consequences have a tendency to dissuade persons from practicing religions which observe a day other than Sunday. Furthermore, the effect of Sunday statutes is to make uncommitted or marginally religious individuals available for religious services on Sunday, while rendering it difficult to attract those of them unwilling to work less than six days a week to Sabbatarian services. Insofar as Sunday statutes thus induce religious conformity, the secular advantages flowing from a heterogeneous society, such as the availability of diverse views and religiously inspired cultures and the promotion of a non-provincial attitude through contact with other groups, are diminished. Since the effect of Sunday statutes upon religion often becomes a political issue, undesirable political division according to religious affiliation may be fostered. Finally, if Sunday statutes are meant for religious purposes, they are the product of a government which has, in passing them, diverted its energies from the socio-economic issues that are its proper concern.<sup>11</sup>

Infidels regard no day as holy. Friends hold there is no more holiness in one day than another. Jews and Seventh Day Adventists observe the seventh day, Mohammedans celebrate Friday, Khevsur's Friday, Saturday and Sunday.<sup>12</sup> Buddhists — a day determined by phases of the moon and may vary from week to week. *Crown Kosher Super Market of Massachusetts, Inc. v. Gallagher*, 176 F. Supp. 466, 4 Encyl. Soc. Sci. 414 (1937) (Holidays).

<sup>11</sup> *Harvard Law Review*, Vol. 73:729, p. 734.

<sup>12</sup> *Twelve Secrets of the Caucasus* — Essad — Bey (1931) Viking Press.

## CONCLUSION

The purpose of the early Sunday Blue Laws was essentially to compel the observance of the Sabbath. Through the years, State courts and Legislatures have affirmed the early holdings under States' police power theory in providing for the health and welfare of its citizens. There has been a vast change in the thinking of our nation since the Blue Laws were first presented in Colonial America. The Supreme Court of United States has last ruled on a Blue Law case in *Petit v. Minnesota*, 177 U.S. 164 (1900).

In recent years the Sunday Blue Laws have taken on a new perspective. They have become a lethal weapon in the economic war of competition. The growth of metropolitan shopping areas, affording adequate parking and one-stop shopping, has been the target of a prolific attack by in-town stores which seek to enforce the Sunday laws against their competitors. Various pressure groups and lobbies have sought legislative enactments for unexplainable and irreconcilable classifications to legalize the sale of exempted commodities.

The legal effect of the Maryland Blue Laws is that excepted commodities are allowed to be sold throughout the state. These commodities are not inherently for necessity or for charity. Further, in Anne Arundel County, the list of excepted products is enlarged so that beaches may sell additional commodities which merchants in other areas of the state are forbidden to vend.

The statute finally declares that Marylanders observe Sunday as the day of rest. This requirement has the direct consequence of making many citizens observe two days of rest in each week, the statutory day, and the day of their own religious conviction. The statute thus fosters Chris-



tiarity over the other religions of the world. It is for these reasons that the appellants respectfully submit that the Maryland Blue Laws are unconstitutional and in deprivation of the basic freedoms guaranteed by the Constitution and the 14th Amendment thereto.

Respectfully submitted,

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In The

# Supreme Court of the United States

October Term 1960

No. 8

MARGARET M. BROWN, et al.

STATE OF MARYLAND,

vs. APPROVED BY COURT OF APPEALS OF THE  
State of Maryland.

## BRIEF OF APPEAL

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1960

No. 8

MARGARET M. McGOWAN, ET AL.,

*Appellants,*

v.

STATE OF MARYLAND,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF MARYLAND

**BRIEF OF APPELLEE**

**COUNTER-STATEMENT OF QUESTIONS  
PRESENTED**

As phrased by appellants, Question I raises non-federal questions under Articles 19 and 23 of the Maryland Declaration of Rights; we deny that those matters can be considered in this appeal. In all other respects, we concede that Question I is properly before this Court and we accept appellants' statement of that question.

We deny that Question II is properly before this Court. It was neither raised nor decided below; it can not be raised for the first time before this Court.



We concede that Questions III and IV are properly before this Court and we accept appellants' statement of those questions.

### COUNTER-STATEMENT OF THE CASE

On Sunday, September 28, 1958, in a store located in Anne Arundel County, Maryland, appellants, employees of a company known as "Two Guys from Harrison", sold a three-ring loose-leaf binder, a can of floor wax, a toy submarine and a stapler and staples (R. 40-41, 48-50, 59-60). They were immediately arrested and charged with violating the Sunday sales laws in effect in that County. Those laws,\* when taken together, prohibit the sale of any articles, or the performance of any work or labor, on Sunday, subject to the following exceptions:

(a) Sales of the following items are permitted on Sunday:

wine, beer and liquor;

tobacco, cigars and cigarettes;

candy, sodas and soft drinks;

ice, ice cream, ices and other "confectionery";

milk, bread and fruits;

gasoline, oils and greases;

drugs, medicines and patent medicines;

newspapers and periodicals;

"novelties, souvenirs, accessories or other merchandise essential to, or customarily sold at, or

\* Annotated Code of Maryland (1957 Ed.): Sections 492, 509, 521, 522 of Article 27 and Section 28 of Article 2B; Code of Local Public Laws of Anne Arundel County (Flack, 1947), Sections 384 and 385; Resolutions of the County Commissioners of Anne Arundel County of March 11, 1952 and of October 7, 1958. Although listed in appellants' brief as being involved in this appeal, not all of the foregoing statutory provisions were reprinted in appellants' brief. Relying upon the statement of appellants' counsel that all missing material will be reprinted in full in appellants' reply brief, we have not undertaken to reprint it herein.

incidental to," the operation of any bathing beach, bath house, amusement park, "dancing saloon", or picnic grove;

- (b) The following activities are permitted on Sunday:
- the wagering of money by the playing of slot machines, pinball machines and bingo;
  - activities relating to the enjoyment of the items permitted to be sold as set forth above;
  - work and labor in connection with the sales and activities listed above;
  - "works of necessity and charity."

Upon conviction, each appellant was fined \$5.00 and costs.

## ARGUMENT

### I.

#### **The Maryland Sunday Sales Laws Do Not Violate the Constitutional Guaranty of Religious Freedom.**

##### *A. Scope of Question Presented.*

The First Amendment guaranty of religious freedom, as made applicable to the States by the Fourteenth Amendment, is of dual aspect; it proscribes the enactment of any law: (a) "respecting an establishment of religion"; or (b) "prohibiting the free exercise thereof". In the present case, appellants tendered no evidence whatsoever to show that the Sunday sales laws in question violate either aspect of that guaranty. Moreover, appellants did not, and do not now, contend that those laws interfere in any manner with their own religious exercises or practices; the record does not even disclose what religion, or religions, if any, they profess. Appellants thus clearly lack standing to challenge those laws as being in violation of the "free exercise" clause. *Tileston v. Ullman*, 318 U. S. 44 (1943); *Everson v. Board of Education*, 330 U.S. 1, 4 (1947).

The narrow question presented by this appeal is, then, whether the Maryland statutes, on their face, violate the "establishment of religion" clause of the First Amendment.

**B. *The Maryland Sunday Sales Laws Are Not Laws "Respecting An Establishment of Religion"; They Are Civil Regulations Affording a Day of Rest And Relaxation.***

From a strictly historical point of view, it may be said with fairness that the original enactments concerning Sunday activities were prompted by a desire for better observance of the Christian Sabbath. It is thus not surprising that the first statute in Maryland\* dealing directly with Sunday sales, entitled "An Act against Prophaning of the Sabbath Day" (enacted by the Maryland Assembly in 1674, Archives of Maryland, Proceedings of the Assembly 1666-1676, p. 414), outlawed those two activities which have always been considered as the most odious from the standpoint of "Sabbath-breaking", i.e. the sale of liquor and gambling. That enactment provided in material part:

\* Two earlier statutes dealt with Sunday activities, but not directly with Sunday sales. The first, "An Act concerning Religion", more generally known as the Toleration Act of 1649, which protected all Christians, regardless of sect, "in respect of his or her religion and in the free exercise thereof", made it a crime to profane "the Sabbath or Lord's day called Sunday by frequent swearing, drunkenness or by any uncivill or disorderly recreation, or by working on that day when absolute necessity doth not require it" (Archives of Maryland, Proceedings of the Assembly 1637-1664, p. 244). The second, "The Act of Recognition of 1654", recognized Cromwell as Lord Protector of England, repealed the Toleration Act, outlawed the Catholic religion, and provided, in Section 12, that "noe work shall be done on the Sabbath Day but that which is of Necessity and Charity to be done, no Inordinate Recreation as Fowling, fishing, hunting or other, no shooting of Gunns be used on that day Except in Case of Necessity" (Archives of Maryland, Proceedings of the Assembly 1637-1664, p. 339).

"Whereas the Lawes of this Province have allready provided for punishing the prophanacion of the Sabbath or Lords Day ~~but not~~ Restraint laid on ordinary Keepers and others who make it their comon practice on that day to Keep in and about their houses Drincking, Tipling and gaming and suffer and mainteine the same to the great dishonour of Almighty God the Discredit of Christianity and the debauching of youth and the encrease and encouragment of vice and Profanesse amongst all sorts, bee it therefore enacted . . . that noe ordinary Keeper shall from and after the publicacon hereof directly nor indirectly upon the Sabbath or Lords Day draw or sell any strong Liquors nor permit or suffer in or about their house or houses any tipling or gaming att Cards, Dice, ninepinn playing or other such unlawfull exercises whatsoever.

But even the most staunch foes of Sunday sales laws must concede that the statutes under consideration in this case have none of the religious overtones found in the colonial enactments. Far from preventing the "profaning of the Sabbath", the laws challenged in the present case permit, if not encourage, a host of activities far removed from any concept of a religious observance. As has been seen, those laws permit the sale of liquor, the operation of gambling devices and the conduct of various amusement establishments, including "dancing saloons", on Sunday. They have no recitations as to any religious purpose.\* They are today for all purposes nothing more than civil regulations designed to achieve highly beneficial social objectives, i.e., limitation of the number of consecutive days on which employees can be required to work and the creation of a day

\* Section 492 of Article 27 of the Annotated Code of Maryland (1957 Ed.), the section dealing with Sunday activities other than sales, while organizing prohibition as to religious purpose, does, however, retain the old language about profaning "the Lord's day". Sections 521 and 509 of that Article, the sections dealing directly with Sunday sales, do not even retain that vestige of the past.

of universal relaxation, recreation, and social intercourse. As this Court said in *Petit v. Minnesota*, 177 U.S. 164, 165 (1900):

"We have uniformly recognized state laws relating to the observance of Sunday as enacted in the legitimate exercise of the police power of the State. The subject was fully considered in *Hennington v. Georgia*, 163 U.S. 299, and it is unnecessary to go over the ground again. . . . And these observations of Mr. Justice Field, then a member of the Supreme Court of California, in *Ex parte Newman*, 9 Cal. 502, whose opinion was approved in *Ex parte Andrews*, 18 Cal. 678, in reference to a statute of California relating to that day, were quoted. Its requirement is a cessation from labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessation from labor. One day in seven is the rule, founded in experience, and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted. Well-nigh innumerable decisions of the state courts have sustained the validity of such laws."

And see *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885); *Hennington v. Georgia*, 163 U.S. 299, 304 (1896).

What, then, is the basis of the present attack on these laws? It is simply the assertion that Sunday can not be selected as a civil day of rest for one of two reasons: (a) that day is tainted because of the religious overtones of ancient Sunday laws, or (b) the selection of that day places merchants who, for religious reasons, are also closed on some other day of the week at a competitive disadvantage.

and thus, by such "economic coercion," prefers or tends "to establish" the Christian religion. We submit that neither proposition is sound.

(a) We think it strains common sense to say that because the early Sunday laws had religious overtones, that day could never thereafter be selected as a civil "day of rest". And this is so even though the American labor movement may have used the concept of a "Christian Sunday" as a makeweight in their advocacy of a six-day work week,\* or the fact that some legislators may have allowed the statute to stay on the books because of their own religious convictions. As pointed out by this Court in *Hennington v. Georgia, supra*, in its quotation from the opinion of the Georgia Court (163 U.S. at 306-307):

"That court further said: 'With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a time kept it in force . . .'

\* The role of American Labor in the secularization of Sunday laws has been traced at some length in the brief of Pennsylvania Retailers Association, intervening defendant and appellee in *Brannfeld, et al. v. Johnson, et al.*, October term, 1900, No. 67. As the present case has been placed on the summary calendar for oral argument together with that case, as well as others, for the sake of brevity we will not repeat what is there said.



(b) Even if we assume that the Sunday sales laws exert some degree of "economic coercion" on Sabbatarian merchants.— yet there is absolutely no evidence in the present record that such is the case — it by no means follows that they are invalid. This is merely another way of saying that Christian merchants are incidentally benefited by such laws as compared to their Sabbatarian competitors. But the fact that a statute fulfilling a public need of a secular nature also confers an incidental benefit to religious groups does not convert the statute into one "respecting an establishment of religion," *Everson v. Board of Education*, 330 U.S. 1 (1947). \*

By the same token, incidental coercion in favor of religion does not in itself render a statute violative of the "establishment clause". Thus, while it is just as unconstitutional to directly coerce the irreligious into attending church as it is to coerce a member of one church to attend another, this Court upheld the "released time" plan under consideration in *Zorach v. Clauson*, 343 U.S. 306 (1952), upon a finding that there was no evidence of any coercion by the school authorities, even though there was necessarily indirect coercion on the irreligious to participate in religious services, if only from the psychological urge of

\* It is this incidental benefit to which the Maryland Court of Appeals refers in the case cited by appellants at page 25 of their brief, *Defendant v. State*, 78 Md. 510 (1894) — a case decided long before the Sunday laws were amended so as to permit drinking, gambling, etc. The other Maryland case to which appellants refer at page 26 of their brief, *Kilgus v. Miller & Co. A. & C. Co.*, 208 (1834), held simply (1) that a contract calling for delivery on a specified day which happened to be Sunday would be construed to require delivery on the preceding Saturday, and (2) that the phrase "the Lord's day" or "Sabbath" in one of the early Maryland statutes meant Sunday, rejecting the argument that the phrase referred to the "Sabbath" as that term is understood by Orthodox Jews. The Maryland Court, after noting that "ours is a Christian community," refused to accept such an argument as to statutory construction.



school children to conform. (See dissenting opinions of Mr. Justice Black, at p. 318 *et seq.*, Mr. Justice Frankfurter, at p. 321 *et seq.*, and Mr. Justice Jackson, at p. 323 *et seq.*; and compare the statements of this Court in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) with respect to the psychological effect on school children of being treated differently from others.)

Finally, we point out that on at least three occasions appeals raising the contention that Sunday closing laws violate the "establishment clause" have been dismissed by this Court "for want of a substantial federal question." *State v. Kidd*, 167 Ohio St. 521, 150 N.E. 2d 413, appeal dismissed, 358 U.S. 131 (1958); *State v. Ullner*, 105 Ohio App. 546, 143 N.E. 2d 849 (1957), *aff'd*, 167 Ohio St. 521, 150 N.E. 2d 413, appeal dismissed, 358 U.S. 131 (1958); *People v. Friedman*, 302 N.Y. 75, 96 N.E. 2d 184, appeal dismissed, 341 U.S. 907 (1951). And see the recognition of Sunday as a day of rest in Article I, Sec. 7, of the Constitution itself, which provides:

"If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law."

As an alternative argument, those attacking Sunday laws argue that even if the State can constitutionally inflict such "economic coercion" on Sabbatarian merchants in order to accomplish the desired social objectives, it can do so only if there are no other methods of achieving the desired result in such a manner as to avoid coercion. They suggest that this could be accomplished by selecting some other day, or by selecting both Saturday and Sunday, or by limiting the number of consecutive working days, etc. The answers to this argument are numerous.

As pointed out by the present appellants at page 27 of their brief, probably every day of the week is sacred to some religion in this county. If some day other than Sunday were selected, the legislature would, under appellants theory, always be preferring or "establishing" some religion. This would likewise be true if both Saturday and Sunday are selected. And it would ill behove appellants to contend that this result should be overlooked merely because those who observe other than Saturday or Sunday as a religious day of rest are a very small minority group.

Similar problems would arise if persons worshipping on days other than Sunday were allowed to stay open on that day. Atheists, agnostics and other individuals or groups who hold no day to be holy could charge that such a statute preferred the religious to the irreligious unless they were allowed "to get credit" for any day during the week on which they closed in order to go fishing, see a ball game etc. Such a system, or one which would permit each person to select any one day in seven as a day of rest, or one which would require that a day of rest be given after six consecutive working days, would not only render such statutes completely unenforceable, they would also defeat one of the main purposes of the selection of a universal day of rest.

Day of rest statutes must be enforced, if at all, by policemen walking their beats. It is a simple matter for the individual policeman to decide whether any establishment open on Sunday comes within one of the exceptions to the Sunday laws. It is quite another thing for the policeman to have to ask at each open shop whether the owner and each employee worshipped on some other day that week, or if any is a non-believer, whether he took a day off to go fishing. Moreover, one of the basic aims of the Sunday

closing laws is to afford a universal day of rest and relaxation. It is only by the selection of a uniform day that working people can be assured of social intercourse with their friends and neighbors. And it is "not for the judiciary to say that the wrong day was fixed." *Hennington v. Georgia*, *supra* (163 U.S. at 304).

## II.

### **The Maryland Sunday Sales Laws Do Not Embody Arbitrary, Capricious or Discriminatory Classifications.**

If the laws in question were statutes designed to preserve Sunday as a day for religious observance, then many of the exceptions would indeed be somewhat illogical. To a religious person, it may well seem more in the nature of "Sabbath-breaking" to sell whiskey on Sunday than to sell simonize; to run slot machines or bingo games than to sell loose-leaf binders. But, as we have seen, the Sunday sales laws are purely civil regulations designed to create a day of relaxation and recreation. When viewed in light of this objective, the reasonableness of the classifications effected by these laws becomes readily apparent.

The articles which may be sold in Maryland on Sunday fall into two categories, namely, *necessities* and *items of amusement*. Under the heading of "necessities" may be placed the exceptions allowing the sale of milk, food, drugs and, at least from the standpoint of a smoker, tobacco products. Under the heading of "amusement" may be placed all the other exceptions, such as gasoline, oils and grease (at least if used only for the "Sunday drive"), candy, soft drinks, baseball, football, movie theatres, bathing beaches, dancing pavilions and amusement parks. The case thus reduces itself down to the simple question of whether the exception permitting the sale of liquor and the

playing of bingo and slot machines converts the statute into one which is unreasonably discriminatory. We submit that it does not. For like it or not, a large segment of the public derives amusement from drinking intoxicating liquor and from various forms of gambling.

When viewed in this light, as we think it must be, the statute under which appellants were convicted, with all its exceptions, does not embody arbitrary, capricious and discriminatory classifications. It may be that this Court could suggest additional and perhaps more wholesome forms of recreation than those embodied in the various exceptions. But that goes to the wisdom of the statute and thus raises non-justiciable issues. Clearly "a state of facts reasonably can be conceived that would sustain" the particular classification; it therefore does not violate the Fourteenth Amendment. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959).

The case of *People v. Friedman*, 302 N.Y. 75 (app. dismissed "for want of a substantial federal question" 341 U.S. 907) fully supports our position and completely answers the arguments advanced by appellants. There the defendant was convicted of selling uncooked meat on Sunday in violation of Section 2147 of the New York Penal Law. That Section prohibits Sunday sales generally, but contains exceptions, including the sale of beer for off-premises consumption during certain hours. The Court of Appeals of New York affirmed the conviction, stating (at pp. 79-81):

"Section 2147 may not be said to deny the equal protection guaranteed by the Fourteenth Amendment by reason of being discriminatory class legislation. The statutory scheme is that of a general prohibition against specified activities on Sunday with some exceptions as to necessities, recreation and conveniences, many of which exceptions merely emphasize that the Legisla-

ture recognizes Sunday as a day for rest, play, relaxation and recreation rather than merely as a religious Sabbath. The statutory scheme viewed as a whole is a valid one and does not constitute discrimination. While the statute may not be perfectly symmetrical in its pattern of exclusions and inclusions, the equal protection of the laws does not require a Legislature to achieve "abstract symmetry" or to classify with "mathematical nicety."

The lack of any real authority to the contrary is emphasized by the case upon which appellants rely in support of their contention. *Gronlund v. Salt Lake City*, 113 Utah 284 (appellants' brief, pp. 12-14) did indeed hold the ordinance there under consideration invalid. But not primarily for the reason suggested by appellants. The court held it arbitrarily discriminatory since, unlike the Maryland statutes, it was "not a general Sunday closing law" but merely one which prevented certain mercantile pursuits while permitting others having nothing to do with recreation. The court epitomized this holding when it said (194 P. 2d, at 467):

"It is difficult to conceive why it is promotive of the health, safety, morals, peace, good order, comfort and convenience of the inhabitants of Salt Lake City to prohibit, in effect the working of a salesman or saleswoman on Sunday, while permitting the employment of common laborers, artisans, stenographers and laundresses."

That the above is the real holding of this case and not the "can of beer vs. can of coffee" basis suggested by appellants becomes readily apparent when we re-insert the sentence deleted from the second paragraph of the quotation from that case at page 13 of appellants' brief. The missing sentence reads—

"In view of what we have said hereinabove as to the ordinance not being a general Sunday closing law

designed to accomplish the purposes it purports to effect, we shall devote little space to the argument made as to discrimination between the sale of commodities."

But even if we assume *arguendo*, that the exceptions applicable to Anne Arundel County create unconstitutional classifications, appellants' convictions must still be affirmed. This follows from the fact that the exceptions were created by statutes which purported to repeal, *pro tanto*, the basic Sunday sales statute under which appellants were convicted; and if the exceptions thereby created are unlawful the statutes enacting them are unconstitutional and void. This being the case, the basic statute remains in full force and effect "because an existing statute cannot be recalled or restricted by anything short of a constitutional enactment." *Davis v. Wallace*, 257 U.S. 478, 485; *Frost v. Corporation Commission*, 278 U.S. 515, 525. Thus the result would not be to render appellants' activities legal, but rather to render illegal all sales now permitted under the exceptions to the general law.

### III.

#### The Challenged Statutes Are Not Unconstitutionally Vague.

Appellants concede that Section 521 of Article 27 of the Maryland Annotated Code (1957 Ed.), the general Sunday sales statute under which they were convicted, is sufficiently definite. They assert that Section 509, which creates exceptions to Section 521, is unconstitutionally vague. Even if that were true, appellants' convictions under Section 521 would stand for the reasons discussed above since only Section 509 would be void. But we submit that Section 509 is not unconstitutionally vague.



It is, of course, true that a criminal statute must be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" and not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). But the Sunday sales laws in Anne Arundel County clearly meet this test.

Section 521 prohibits the sale on Sunday of "any articles of merchandise" except certain listed items. Section 509 adds to those exceptions "novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to" bathing beaches, bathhouses, amusement parks and dancing saloons. This clearly informs the public of the *type* of articles intended to come within the exceptions. And that is sufficient, for simply because "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense". *United States v. Petrillo*, 332 U.S. 1, 7 (1947).

Far from showing any honest doubt as to the meaning of the statutes involved, the record in this case shows a studied attempt to operate under the guise of compliance with Section 509. Witness Kicey, the manager of the store, very piously testified that he and one of the owners selected for Sunday sale only such items as they thought could be sold under Section 509 (R. 76-78). Yet it is undisputed that the store had its *hardware department* open. We cannot believe that it was thought in good faith that three-ring binders, cans of floor wax and staplers and staples are "novelties, souvenirs, accessories or other merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, bath houses, amusement



parks, or dancing pavilions — even if it be conceded that the toy submarine is not a clear case. When a defense of vagueness is raised the courts have consistently held that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyc Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

In short, the statute sufficiently advises the public of the conduct sought to be prohibited. It matters not that there may be certain cases where it is difficult to tell whether a particular item may or may not be sold. "It is well settled that a penal statute or ordinance should not be held void merely because juries may differ in their judgments in cases brought thereunder on the same state of facts. . . . [A] statute is not void for indefiniteness merely because it casts upon a person the risk of rightly estimating a matter of degrees." *State v. Magaha*, 182 Md. 122, 125 (1943).

#### IV.

#### **Appellants Cannot At This Time Raise the Objection That the Exceptions to the Sunday Sales Laws Are Not Uniform Throughout the State.**

The question as to the effect of the lack of state-wide uniformity with respect to exceptions to the Sunday sales laws was neither raised nor decided below; it cannot be raised for the first time at this stage of the proceedings. *Durley v. Mayo*, 351 U.S. 277 (1956). But even if this question\* were properly before this Court, it would have to be

\* The question of whether a local exception to a general state law is compatible with Article 23 of the Maryland Declaration of Rights — a problem similar to that considered by the opinion of the Attorney General and the two Maryland cases cited at page 20 of appellants' brief — raises no federal question and thus would not in any event be subject to review in this appeal.

answered adversely to the appellants. There is absolutely nothing in the record which would in any manner tend to overcome the presumption that the local exceptions to the general law were required by local conditions. The statutes would thus have to be upheld. *Salsburg v. Maryland*, 346 U.S. 553 (1954).

### CONCLUSION

For the foregoing reasons, the judgments should be affirmed.

Respectfully submitted,

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For Appellee.

# SUPREME COURT OF THE UNITED STATES

No. 8.—OCTOBER TERM, 1960.

Margaret M. McGowan,  
et al., Appellants,  
v.  
State of Maryland.

On Appeal From the Court  
of Appeals of the State of  
Maryland.

[May 29, 1961.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The issues in this case concern the constitutional validity of Maryland criminal statutes, commonly known as Sunday Closing Laws or Sunday Blue Laws. These statutes, with exceptions to be noted hereafter, generally proscribe all labor, business and other commercial activities on Sunday. The questions presented are whether the classifications within the statutes bring about a denial of equal protection of the law, whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process, and whether the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof.

Appellants are seven employees of a large discount department store located on a highway in Anne Arundel County, Maryland. They were indicted for the Sunday sale of a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine in violation of Md. Ann. Code, Art. 27, § 52F. Generally, this section prohibited, throughout the State, the Sunday sale of all merchandise except the retail sale of tobacco products.

These statutes, in their entirety, are found in Md. Ann. Code, Art. 27, §§ 492-534C; Art. 28, §§ 28 G, 96-106; Art. 66G, §§ 132 G(1), 698 (d). Those sections specifically referred to hereafter may be found in an Appendix to this opinion.

confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals. Recently amended, this section also now excepts from the general prohibition the retail sale in Anne Arundel County of all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs. It now further provides that any retail establishment in Anne Arundel County which does not employ more than one person other than the owner may operate on Sunday.

Although appellants were indicted only under § 521, in order properly to consider several of the broad constitutional contentions, we must examine the whole body of Maryland Sunday laws. Several sections of the Maryland statutes are particularly relevant to evaluation of the issues presented. Section 492 of Md. Ann. Code, Art. 27, forbids all persons from doing any work or bodily labor on Sunday and forbids permitting children or servants to work on that day or to engage in fishing, hunting and unlawful pastimes or recreations. The section excepts all works of necessity and charity. Section 522 of Md. Ann. Code, Art. 27, disallows the opening or use of any dancing saloon, opera house, bowling alley or barber shop on Sunday. However, in addition to the exceptions noted above, Md. Ann. Code, Art. 27, § 509 exempts, for Anne Arundel County, the Sunday operation of any bathing beach, bathhouse, dancing saloon, and amusement park, and activities incident thereto and retail sales of merchandise customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses. Section 90 of Md. Ann. Code, Art. 2B, makes generally unlawful the sale of alcoholic beverages on Sunday. However, this section, and immediately succeeding ones, provide various immunities for the Sunday sale of different kinds of alcoholic beverages, at different hours during the day, by vendors holding different types of licenses.

in different political divisions of the State—particularly in Anne Arundel County. See Md. Ann. Code, Art. 2B, § 28 (a).

The remaining statutory sections concern a myriad of exceptions for various counties, districts of counties, cities and towns throughout the State. Among the activities allowed in certain areas on Sunday are such sports as football, baseball, golf, tennis, bowling, croquet, basketball, lacrosse, soccer, hockey, swimming, softball, boating, fishing, skating, horseback riding, stock car racing and pool or billiards. Other immunized activities permitted in some regions of the State include group singing or playing of musical instruments; the exhibition of motion pictures; dancing; the operation of recreation centers, picnic grounds, swimming pools, skating rinks and miniature golf courses. The taking of oysters and the hunting or killing of game is generally forbidden, but shooting conducted by organized rod and gun clubs is permitted in one county. In some of the subdivisions within the State, the exempted Sunday activities are sanctioned throughout the day; in others, they may not commence until early afternoon or evening; in many, the activities may only be conducted during the afternoon and late in the evening. Certain localities do not permit the allowed Sunday activity to be carried on within one hundred yards of any church where religious services are being held. Local ordinances and regulations concerning certain limited activities supplement the State's statutory scheme. In Anne Arundel County, for example, slot machines, pinball machines and bingo may be played on Sunday.

Among other things, appellants contended at the trial that the Maryland statutes under which they were charged were contrary to the Fourteenth Amendment for the reasons stated at the outset of this opinion. Appellants were convicted and each was fined five dollars and costs. The Maryland Court of Appeals affirmed. 220

Md. H7, 151 A. 2d 156; on appeal brought under 28 U. S. C. § 1257 (2), we noted probable jurisdiction, 362 U. S. 959.

## I.

Appellants argue that the Maryland statutes violate the "Equal Protection" Clause of the Fourteenth Amendment on several counts. First, they contend that the classifications contained in the statutes concerning which commodities may or may not be sold on Sunday are without rational and substantial relation to the object of the legislation.<sup>2</sup> Specifically, appellants allege that the statutory exemptions for the Sunday sale of the merchandise mentioned above render arbitrary the statute under which they were convicted. Appellants further allege that § 521 is capricious because of the exemptions for the operation of the various amusements that have been listed and because slot machines, pin-ball machines, and bingo are legalized and are freely played on Sunday.

The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws

<sup>2</sup> Companion arguments made by appellants are that the exceptions to the Sunday sale's prohibition undermine the alleged purpose of Sunday as a day of rest as to bear no rational relationship to it and thereby render the statutes violative of due process; that the distinctions drawn by the statutes are so unreasonable as to violate due process.



result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Comm'rs*, 330 U. S. 552; *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96.\*

It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day—that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; that some people will prefer alcoholic beverages or games of chance to add to their relaxation; that newspapers and drug products should always be available to the public.

The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment. See *Salsburg v. Maryland* 346 U. S. 545, 552-553; *Kotch*

More recently we declared:

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. Texas*, 310 U. S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Dental Examiners*, 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L. v. American Sash Co.*, 335 U. S. 538. The prohibition of the Equal Protection Clause goes no further than the *invidious discrimination*." *Williamson v. Lee Optical*, 348 U. S. 483, 489. (Emphasis added.)

v. *Board of River Port Pilot Comm'rs, supra*. Likewise, the fact that these exemptions exist and deny some vendors and operators the day of rest and recreation contemplated by the legislature, does not render the statutes violative of equal protection since there would appear to be many valid reasons for these exemptions, as stated above, and no evidence to dispel them.

Secondly, appellants contend that the statutory arrangement which permits only certain Anne Arundel County retailers to sell merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, amusement parks et cetera is contrary to the "Equal Protection" Clause because it discriminates unreasonably against retailers in other Maryland counties. But we have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion. We find no invidious discrimination here. See *Salsburg v. Maryland, supra*.

Thirdly, appellants contend that this same statutory provision, Art. 27, § 509, violates the "Equal Protection" Clause because it permits only certain merchants within Anne Arundel County (operators of bathing beaches and amusement parks et cetera) to sell merchandise customarily sold at these places while forbidding its sale by other vendors of this merchandise, such as appellant's employer.<sup>4</sup> Here again, it would seem that a legislature

<sup>4</sup> Whether § 509 is to be read this way or is to be read to permit the sale of such merchandise by all vendors in Anne Arundel County is unclear. The Maryland Court of Appeals found it unnecessary to reach this question of state law. For purposes of this argument, we accept the construction of § 509 set forth by appellants.

could reasonably find that these commodities necessary for the health and recreation of its citizens, should only be sold on Sunday by those vendors at the locations where the commodities are most likely to be immediately put to use. Such a determination would seem to serve the consuming public and at the same time secure Sunday rest for those employees, like appellants, of all other retail establishments. In addition, the enforcement problems which would accrue if large retail establishments, like appellants' employer, were permitted to remain open on Sunday but were restricted to the sale of the merchandise in question, would be far greater than the problems accruing if only beach and amusement park vendors were exempted. Here again, there has been no indication of the unreasonableness of this differentiation. On the record before us, we cannot say that these statutes do not provide equal protection of the laws.

## II.

Another question presented by appellants is whether Art. 27, § 509, which exempts the Sunday retail sale of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, amusement parks et cetera in Anne Arundel County, is unconstitutionally vague. We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. See *United States v. Harriss*, 347 U. S. 612, 617-618. Under these circumstances, there is no necessity to guess at the statute's meaning in order to determine what conduct it makes criminal. *Connally v. General Construction Co.*, 269 U. S. 385, 391. Questions concerning proof that the items appellants sold were customarily

sold at, or incidental to, the operation of a bathing beach or amusement park were not raised in the Maryland Court of Appeals, nor are they raised here. Thus, we cannot consider the matter. *Whitney v. California*, 274 U. S. 357, 362-363.

### III.

The final questions for decision are whether the Maryland Sunday Closing Laws conflict with the Federal Constitution's provisions for religious liberty. First, appellants contend here that the statutes applicable to Anne Arundel County violate the constitutional guarantee of freedom of religion in that the statutes' effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to the States by the Fourteenth Amendment.<sup>5</sup> But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," *United States v. Raines*, 362 U. S. 17, 22, we hold that appellants have no standing to raise this contention.<sup>6</sup> *Tileston v. Ullman*, 318 U. S. 44, 46. Furthermore, since appellants do not specifically allege that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons, we have no occasion here to consider the standing question.

<sup>5</sup> *Cantwell v. Connecticut*, 310 U. S. 296, 303; *Murdock v. Pennsylvania*, 319 U. S. 105, 108; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 639; *Everson v. Board of Education*, 330 U. S. 1, 5; *McCullum v. Board of Education*, 333 U. S. 293, 210.

<sup>6</sup> Mr. Justice Black is of the opinion that appellants do have standing to raise this contention. He believes that their claim is without merit for the reasons expressed in *Braunfeld v. Brown*, — U. S. —, — and *Gallagher v. Crown Kasher Super Market* — U. S. —, —.

of *Pierce v. Society of Sisters*, 268 U. S. 510, 535-536. Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights. Cf. *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 459-460; *Barrows v. Jackson*, 346 U. S. 249, 257. Appellants present no weighty countervailing policies here to cause an exception to our general principles. See *United States v. Raines*, *supra*.

Secondly, appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment, made applicable to the states by the Fourteenth Amendment. If the purpose of the "establishment" clause was only to ensure protection for the "free exercise" of religion, then what we have said above concerning appellant's standing to raise the "free exercise" contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.<sup>1</sup> Thus, in *Everson v. Board of Education*, *supra*, the Court permitted a district taxpayer to challenge, on "establishment" grounds, a state statute which authorized district boards of education to reimburse parents for fares paid for the transportation of their children to both public and Catholic schools. Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion.<sup>2</sup> We find that, in these circumstances, these appellants have standing to complain that

<sup>1</sup> Madison's Memorial and Remonstrance Against Religious Assessments, Par. 8, reprinted in the Appendix to Mr. Justice Rutledge's dissenting opinion in *Everson v. Board of Education*, *supra*, at p. 68. Cf. *Doremus v. Board of Education*, 342 U. S. 593, 599, where complainants failed to show direct and particular economic detriment.

the statutes are laws respecting an establishment of religion.

The essence of appellant's "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day. In substantiating their "establishment" argument, appellants rely on the wording of the present Maryland statutes, on earlier versions of the current Sunday laws and on prior judicial characterizations of these laws by the Maryland Court of Appeals. Although only the constitutionality of § 521, the section under which appellants have been convicted, is immediately before us in this litigation, inquiry into the history of Sunday Closing Laws in our country, in addition to an examination of the Maryland Sunday closing statutes in their entirety and of their history, is relevant to the decision of whether the Maryland Sunday law in question is one respecting an establishment of religion. There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.

Sunday Closing Laws go far back into American history, having been brought to the colonies with a background of English legislation dating to the thirteenth century. In 1237, Henry III forbade the frequenting of markets on Sunday; the Sunday showing of wools at the staple was banned by Edward III in 1354; in 1409, Henry IV pro-



hibited the playing of unlawful games on Sunday; Henry VI proscribed Sunday fairs in churchyards in 1444 and, four years later, made unlawful all fairs and markets and all showings of any goods or merchandise; Edward VI disallowed Sunday bodily labor by several injunctions in the mid-sixteenth century; various Sunday sports and amusements were restricted in 1625 by Charles I. Lewis, *A Critical History of Sunday Legislation* 82-108; Johnson and Yost, *Separation of Church and State* 221. The law of the colonies to the time of the Revolution and the basis of the Sunday laws in the States was 29 Charles II, c. 7 (1677). It provided, in part:

"For the better observation and keeping holy the Lord's day, commonly called Sunday: be it enacted . . . that all the laws enacted and in force concerning the observation of the Lord's day, *and repairing to the church thereon*, be carefully put in execution; and that all and every person and persons whatsoever shall upon every Lord's day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, laborer, or other person whatsoever, *shall do or exercise any worldly labor, or business or work* of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted); . . . and that no person or persons whatsoever shall publicly cry, show forth, or expose for sale any wares, merchandise, fruit, herbs, goods, or chattels, whatsoever, upon the Lord's day, or any part thereof. . . ." (Emphasis added.)

Observation of the above language, and of that of the prior mandates, reveals clearly that the English Sunday legislation was in aid of the established church.

<sup>1</sup> English statutes subsequent to this are cited and discussed in *supra*, op. cit. *supra*, pp. 111-142.

The American colonial Sunday restrictions arose soon after settlement. Starting in 1650, the Plymouth Colony proscribed servile work, unnecessary travelling, sports, and the sale of alcoholic beverages on the Lord's day and enacted laws concerning church attendance. The Massachusetts Bay Colony and the Connecticut and New Haven Colonies enacted similar prohibitions, some even earlier in the seventeenth century. The religious orientation of the colonial statutes was equally apparent. For example, a 1629 Massachusetts Bay instruction began, "And to the end the Sabbath may be celebrated in a religious manner. . . ." A 1653 enactment spoke of Sunday activities "which things tend much to the dishonor of God, the reproach of religion, and the profanation of his holy Sabbath, the sanctification whereof is sometimes put for all duties immediately respecting the service of God. . . ."

Lewis, *op. cit.*, *supra*, at pp. 160-195, particularly at 167, 169.<sup>10</sup> These laws persevered after the Revolution and at about the time of the First Amendment's adoption, each of the colonies had laws of some sort restricting Sunday labor. See note, 73 Harv. L. Rev. 729-730, 739-740; Johnson and Yost, *op. cit.*, *supra*, at pp. 222-223.

But, despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their

<sup>10</sup> A 1695 New York Sunday law provided:

"Whereas, the true and sincere worship of God according to his holy will and commandments, is often profaned and neglected by many of the inhabitants and sojourners in this province, who do not keep holy the Lord's day, but in a disorderly manner accustom themselves to travel, laboring, working, shooting, fishing, sporting, playing, horse-racing, frequenting of tippling houses and the using many other unlawful exercises and pastimes, upon the Lord's day, to the great scandal of the holy Christian faith, be it enacted, etc." *Id.* at 260-261.

totally religious flavor. In the middle 1700's, Blackstone wrote, "[T]he keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness." 4 Bl. Comm. 63. A 1788 English statute dealing with chimney sweeps, 28 Geo. III, c. 48, in addition to providing for their Sunday religious affairs, also regulated their hours of work. The preamble to a 1679 Rhode Island enactment stated that "persons being evill minded have presumed to employ in servile labor, more than necessity requireth, their servants." 3 Records of the Colony of Rhode Island and Providence Plantations 31. The New York law of 1788 omitted the term "Lord's day" and substituted "the first day of the week commonly called Sunday." 2 Laws of N. Y. 1785-1788, 680. Similar changes marked the Maryland statutes, discussed below. With the advent of the First Amendment, the colonial provisions requiring church attendance were soon repealed. Note, 73 Harv. L. Rev., *supra*, at pp. 729-730.

More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come. In England, during the First World War, a committee investigating the health conditions of munitions workers reported that "if the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed. . . . On

economic and social grounds alike this weekly period of rest is best provided on Sunday."<sup>11</sup>

The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests. Recent New Jersey Sunday legislation was supported by labor groups and trade associations. Note, 73 Harv. L. Rev. 730-731; modern English Sunday legislation was promoted by the National Federation of Grocers and supported by the National Chamber of Trade, the Drapers' Chamber of Trade, and the National Union of Shop Assistants. 308 Parliamentary Debates, Commons 2158-2159.

Throughout the years, state legislatures have modified, deleted from and added to their Sunday statutes. As evidenced by the New Jersey laws mentioned above, current changes are commonplace. Almost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system. (Note 73 Harv. L. Rev. 732-733; Note 12 Rutgers L. Rev. 506. Some of our States now enforce their Sunday legislation through Departments of Labor, e. g., S. C. Code Ann. (1952), § 64-5. Thus have Sunday laws evolved from the wholly religious sanctions that originally were enacted.

Moreover, litigation over Sunday closing laws is not novel. Scores of cases may be found in the state appellate courts relating to sundry phases of Sunday enactments.<sup>12</sup> Religious objections have been raised there on numerous occasions but sustained only once, in *Ex parte Newman*, 9 Cal. 502 (1858); and that decision was overruled three years later, in *Ex parte Andrews*, 18 Cal. 678. A substantial number of cases in varying postures bearing

<sup>11</sup> Ministry of Munitions, Health of Munition Workers Committee Report on Sunday Labour, Memorandum No. 1 (1915), 5.

<sup>12</sup> See cases collected 70 Am. Jur. 802 *et seq.*; 24 A. L. R. 241 *et seq.*; 57 A. L. R. 241 *et seq.*

on state Sunday legislation have reached this Court.<sup>33</sup> Although none raising the issues now presented have gained plenary hearing, language used in some of these cases further evidences the evolution of Sunday laws as temporal statutes. Mr. Justice Field wrote in *Soon Hing v. Crowley*, *supra*, at p. 710:

"Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

While a member of the California Supreme Court, Mr. Justice Field dissented in: *Ex parte Newman*, *supra*, at pp. 519, 520, 528, saying:

"Its requirement is a cessation from labor. In its enactment, the Legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessations from labor. One

<sup>33</sup> See *Soon Hing v. Crowley*, 113 U. S. 702; *Hennington v. Georgia*, 153 U. S. 299; *Petit v. Minnesota*, 177 U. S. 164; *Friedman v. New York*, 241 U. S. 907; *McGee v. North Carolina*, 346 U. S. 802; *Goodyear Central Motors, Inc. v. Gassert*, 354 U. S. 433; *Grochowski v. Pennsylvania*, 358 U. S. 47; *Muller v. Ohio*, 358 U. S. 131; *Kidd v. Ohio*, 358 U. S. 132.

day in seven is the rule, founded in experience and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted."

This was quoted with approval by Mr. Justice Harlan in *Hennington v. Georgia*, *supra*, who also stated:

"It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. . . . The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease." *Id.*, at 304.

And Mr. Chief Justice Fuller cited both of these passages in *Petit v. Minnesota*, *supra*.

—Before turning to the Maryland legislation now here under attack, an investigation of what historical position Sunday Closing Laws have occupied with reference to the First Amendment should be undertaken. *Everson v. Board of Education*, *supra*, at p. 14.

This Court has considered the happenings surrounding the Virginia General Assembly's enactment of "A Bill for Establishing Religious Freedom," 12 Hening's Statutes of Virginia 84, written by Thomas Jefferson and sponsored by James Madison, as best reflecting the long and intensive struggle for religious freedom in America, as particularly relevant in the search for the First Amendment's meaning. See the opinions in *Everson v. Board of Education*, *supra*. In 1776, nine years before the bill's passage, Madison co-authored Virginia's Declaration of



Rights which provided, *inter alia*, that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . ." 9 Hening's Statutes of Virginia 109, 111-112. Virginia had had Sunday legislation since early in the seventeenth century; in 1776, the laws penalizing "maintaining any opinions in matters of religion, *forbearing to repair to church*, or the exercising any mode of worship whatsoever. . . ." (emphasis added), were repealed, and all dissenters were freed from the taxes levied for the support of the established church. *Id.* at 164. The Sunday labor prohibitions remained; apparently, they were not believed to be inconsistent with the newly-enacted Declaration of Rights. Madison had sought also to have the Declaration expressly condemn the existing Virginia establishment.<sup>14</sup> This hope was finally realized when "A Bill for Establishing Religious Freedom" was passed in 1785. In this same year, Madison presented to Virginia legislators "A Bill for Punishing . . . Sabbath Breakers" which provided, in part:

"If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except if be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence."<sup>15</sup>

This became law the following year and remained during the time that Madison fought for the First Amendment in the Congress. It was the law of Virginia, and similar

<sup>14</sup> Brant, James Madison, *The Virginia Revolutionist*, 245-246.

<sup>15</sup> *The Papers of Thomas Jefferson* 555.

laws were in force in other States, when Madison stated at the Virginia ratification convention:

"Happy for the states, they enjoy the utmost freedom of religion. . . . Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment. I believe it to be so in other states. . . . I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom."<sup>10</sup>

In 1799, Virginia pronounced "A Bill for Establishing Religious Freedom" as "a true exposition of the principles of the bill of rights and constitution," and repealed all subsequently enacted legislation deemed inconsistent with it.<sup>11</sup> 2 Shepherd Statutes at Large of Virginia 149. Virginia's statute banning Sunday labor stood.<sup>12</sup>

In *Reynolds v. United States*, 98 U. S. 145, the Court relied heavily on the history of the Virginia bill. That case concerned a Mormon's attack on a statute making bigamy a crime. The Court said:

"In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature of that State substantially enacted the statute of

<sup>10</sup> 3 Elliotts Debates (2d ed. 1891) 330.

<sup>11</sup> In *Judge v. State*, 78 Md. 540, 545, 28 A. 405, 407, the Maryland Court of Appeals stated, "Article thirty-six of our Declaration of Rights guarantees religious liberty; but the members of the distinguished body that adopted that Constitution never supposed they were giving a death blow to Sunday laws by inserting that Article."

James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy, or polygamy be punishable by the laws of this Commonwealth." 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, recognizable by the civil courts and punishable with more or less severity. In the face of all of this evidence it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." *Id.*, at 165.

In the case at bar, we find the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive.

But in order to dispose of the case before us, we must consider the standards by which the Maryland statutes are to be measured. Here, a brief review of the First Amendment's background proves helpful. The First Amendment states that "Congress shall make no law respecting an establishment of religion." U. S. Const., Amend. I. The Amendment was proposed by James Madison on June 8, 1789 in the House of Representatives. It then read, in part:

"The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." (Emphasis added.) 1 Annals of Congress 434.

We are told that Madison added the word "national" to meet the scruples of States which then had an established church. 1 Stokes, Church and State in the United

beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

We now reach the Maryland statutes under review. The title of the major series of sections of the Maryland Code dealing with Sunday closing—Art. 27, §§ 492-534C—is "Sabbath Breaking"; § 492 proscribes work or bodily labor on the "Lord's day," and forbids persons to "profane the Lord's day" by gaming, fishing et cetera; § 522 refers to Sunday as the "Sabbath day." As has been mentioned above, many of the exempted Sunday activities in the various localities of the State may only be conducted during the afternoon and late evening; most Christian church services, of course, are held on Sunday morning and early Sunday evening. Finally, as previously noted, certain localities do not permit the allowed Sunday activities to be carried on within one hundred yards of any church where religious services are being held. This is the totality of the evidence of religious purpose which may be gleaned from the face of the present statute and from its operative effect.

The predecessors of the existing Maryland Sunday laws are undeniably religious in origin. The first Maryland statute dealing with Sunday activities, enacted in 1649;

was entitled "An Act concerning Religion." 1 Archives of Maryland 244-247. It made it criminal to "profane the Sabbath or Lords day called Sunday by frequent swearing, drunkenness or by any uncivill or disorderly recreation, or by working on that day when absolute necessity doth not require it." *Id.*, at 245. A 1692 statute entitled "An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province." 13 Archives of Maryland 425-430, after first stating the importance of keeping the Lord's Day holy and sanctified and expressing concern with the breach of its observance throughout the State, then enacted a Sunday labor prohibition which was the obvious precursor of the present § 492.<sup>19</sup> There was a re-enactment in 1696 entitled "An Act for Sanctifying & keeping holy the Lord's Day Commonly called Sunday." 19 Archives of Maryland 418-420. By 1723, the Sabbath-breaking section of the statute assumed the present form of § 492, omitting the specific prohibition against Sunday swearing and the patently religiously motivated title. Bacon, Laws of Maryland, §2.

There are judicial statements in early Maryland decisions which tend to support appellants' position. In an 1834 case involving a contract calling for delivery on Sunday, the Maryland Court of Appeals remarked that "Ours is a christian community, and a day set apart as the day of rest, is the day consecrated by the resurrection of our

<sup>19</sup> "[N]o Person or Persons within this Province shall work or do any bodily Labour or Occupation upon any Lords Day commonly called Sunday, nor shall command or wilfully suffer or permitt any of his or their children Servants or Slaves to work or labour as aforesaid (the absolute works of necessity and mercy allways Excepted) Nor shall suffer or permitt any of his her or their Children Servants or Slaves or any other under their Authority to abuse or Prophane the Lords Day by drunkenness, Swearing Gaming, fowling fishing, hunting or any other Sports Pastimes or Recreations whatsoever." *Id.* at 426.

Saviour, and embraces the twenty-four hours next ensuing the midnight of Saturday." *Kilgour v. Miles*, 6 Gill and Johnson 268. This language was cited with approval in *Judefind v. State*, 78 Md. 510, 514, 28 A. 405, 406 (1894). It was also stated there:

"It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion—of all sects and denominations that observe that day—as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a Court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, (except works of necessity and charity,) and thereby promotes the cause of Christianity. If the Christian religion is, incidentally or otherwise, benefited or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it. Whilst Courts have generally sustained Sunday laws as 'civil regulations,' their decisions will have no less weight if they are shown to be in accordance with divine law as well as human." *Id.*, at 515–516, 28 A., at 407.

But it should be noted that, throughout the *Judefind* decision, the Maryland court specifically rejected the contention that the laws interfered with religious liberty and stated that the laws' purpose was to provide the "advantages of having a weekly day of rest, 'from a mere physical and political standpoint.'" *Id.*, at 513, 28 A., at 406.

Considering the language and operative effect of the current statutes, we no longer find the blanket prohibition against Sunday work or bodily labor. To the contrary, we find that § 521 of Art. 27, the section which appellants



violated, permits the Sunday sale of tobaccos and sweets and a long list of sundry articles which we have enumerated above; we find that § 509 of Art. 25 permits the Sunday operation of bathing beaches, amusement parks and similar facilities; we find that Art. 2B, § 28, permits the Sunday sale of alcoholic beverages, products strictly forbidden by predecessor statutes; we are told that Anne Arundel County allows Sunday bingo and the Sunday playing of pin-ball machines and slot machines, activities generally condemned by prior Maryland Sunday legislation.<sup>20</sup> Certainly, these are not works of charity or necessity. Section 521's current stipulation that shops with only one employee may remain open on Sunday does not coincide with a religious purpose. These provisions, along with those which permit various sports and entertainments on Sunday, seem clearly to be fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment. Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation rather than one of religion.

The existing Maryland Sunday laws are not simply verbatim re-enactments of their religiously oriented antecedents. Only § 492 retains the appellation of "Lord's day" and even that section no longer makes recitation of religious purpose. It does talk in terms of "profan[ing] the Lord's day," but other sections permit the activities previously thought to be profane. Prior denunciation of Sunday drunkenness is now gone. Contemporary con-

<sup>20</sup> A 1874 Maryland statute provided, in part:

"[T]hat noe ordinary Keeper shall from and after the publicacon hereof directly nor indirectly upon the Sabbath or Lords Day draw or sell any strong Liquors nor permit or suffer in or about their house or houses any tipling or gaming att Cards, Dice, ninepinn playing or other such unlawfull exercises whatsoever. . . ." 2 Archives of Maryland 414.

cern with these statutes is evidenced by the dozen changes made in 1959 and by the recent enactment of a majority of the exceptions.

Finally, the relevant pronouncements of the Maryland Court of Appeals dispel any argument that the statutes' announced purpose is religious. In *Hiller v. Maryland*, 124 Md. 385, 92 A. 842 (1914), the court had before it a Baltimore ordinance prohibiting Sunday baseball. The court said:

"What the eminent chief judge said with respect to police enactments which deal with the protection of the public health, morals and safety apply with equal force to those which are concerned with the peace, order and quiet of the community on Sunday, for these social conditions are well recognized heads of the police power. Can the Court say that this ordinance has no real and substantial relation to the peace and order and quiet of Sunday, as a day of rest, in the City of Baltimore?" *Id.*, at 393, 92 A., at 844. See also *Levering v. Williams*, 134 Md. 48, 54-59, 106 A. 176, 178-179 (1919).

And, the Maryland court declared in its decision in the instant case: "The legislative plan is plain. It is to compel a day of rest from work, permitting only activities which are necessary or recreational." *McGowan v. State*, *supra*, at p. 123, 151 A. 2d, at 159. After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation.

But, this does not answer all of appellants' contentions. We are told that the State has other means at its disposal to accomplish its secular purpose, other courses that would not even remotely or incidentally give state aid to

religion. On this basis, we are asked to hold these statutes invalid on the ground that the State's power to regulate conduct in the public interest may only be executed in a way that does not unduly or unnecessarily infringe upon the religious provisions of the First Amendment. See *Cantwell v. Connecticut*, *supra*, at pp. 304-305. However relevant this argument may be, we believe that the factual basis on which it rests is not supportable. It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice.

However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day in which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day in which people may visit friends and relatives who are not available during working days.<sup>21</sup>

Obviously, a state is empowered to determine that a rest-one-day-in-seven statute would not accomplish this

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<sup>21</sup>This purpose has been articulated in various ways at different times. The parliamentary debates on the British Shops (Sunday Trading Restriction) Bill in 1936 are particularly instructive. The sponsor of the Bill stated:

"I realise also that the State to-day is interfering more and more with family life and more and more controlling the family liberty, and were this a Bill to restrict liberty, and above all to restrict the liberty of the family, I would not be responsible for introducing it. But I hope to show to the House that it is a Bill which is necessary to secure the family life and liberty of hundreds of thousands of our people. . . . They have the right to a holiday on Sunday, to be able to rest from work on that day and to go out into the parks or into the country on a summer day. That is the liberty for which

purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.

Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for

they are asking, and that is the liberty which this Bill would give to them." 308 Parliamentary Debates, Commons 2157-2158.

Another member stated:

"As a family man let me say that my family life would be unduly disturbed if any member had his Sunday on a Tuesday. The value of a Sunday is that everybody in the family is at home on the same day. What is the use of talking about a six-day working week in which six members of a family would each have his day of rest on a different day of the week?" *Id.*, at 2198.

Reports of the International Labour Conferences are also revealing:

"Social custom requires that the same rest-day should as far as possible be accorded to the members of the same working family and to the working class community as a whole. It is a fact that originally religious motives determined the rest-day and that the tradition thus established has subsequently been maintained by law. It appears to be a universal rule that workers in the same area or in the same country have the same rest-day, and that the rest-day coincides with the day established by tradition or custom; and the International Labour Office proposes that this rule should be maintained." Rep. VII, International Labour Conference, 3d Sess. 1921, 127-128.

"A study of national standards shows that the most usual practice is to grant the weekly rest collectively on specified days of the week. This tendency to ensure that the weekly rest is taken at the same time by all workers on the day established by tradition or custom has an obvious social purpose, namely to enable the workers to take part in the life of the community and in the special forms of recreation which are available on certain days." Rep. VII (1), International Labour Conference, 39th Sess. 1956, 24.

family activity, for visiting friends and relatives, for late-sleeping, for passive and active entertainments, for dining out and the like. "Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer. . . ." 308 Parliamentary Debates, Commons 2159. Sunday is a day apart from all others.<sup>22</sup> The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a state to choose a common-day-of-rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion.

The distinctions between the statutes in the case before us and the state action in *McCullum v. Board of Education*, *supra*, the only case in this Court finding a violation of the "Establishment" Clause, lend further substantiation to our conclusion. In *McCullum*, state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation at bar. In *McCullum*, the only alternative available to the nonattending students was to remain in their classrooms; the alternatives open to nonlaboring persons in the instant case are far more diverse. In *McCullum*, there was direct cooperation between state officials and religious ministers; no such direct participation exists under the Maryland laws. In *McCullum*, tax supported buildings were used to aid religion; in the

<sup>22</sup> The Constitution itself provides for a Sunday exception in the calculation of the ten days for presidential veto. U. S. Const., Art. I, § 7.

instant case, no tax monies are being used in aid of religion.

Finally, we should make clear that this case deals only with the constitutionality of § 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.

Accordingly, the decision is

*Affirmed.*



## APPENDIX.

Md. Ann. Code, Art. 27.

### "Sabbath Breaking."

"§ 492.—*Working on Sunday; Permitting children or servants to game, fish, hunt, etc.*—No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting, or unlawful pastime or recreation; and every person transgressing this section and being hereof convicted before a justice of the peace shall forfeit five dollars, to be applied to the use of the county.

"§ 509.—*Beaches, amusement parks, picnic groves, etc., in Anne Arundel County.*—It shall be lawful to operate, work at, or be employed in the occupations of operating any bathing beach, bathhouse, amusement park, dancing saloon, the sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses, at retail, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows and the hiring or renting of boats, tables, chairs, beach umbrellas, on the first day of the week, commonly called Sunday, within Anne Arundel County, and §§ 492, 521 and 522 of this article are repealed, in so far and to the extent that they prohibit the operating of and/or the working of or employment of persons in the operation of any bathing beach, bathhouse, amusement park, dancing saloon, the sale or selling at retail of any merchandise, essential to or customarily sold or incidental to the operation of the aforesaid occupations

or businesses, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows, and the hiring and renting of boats, tables, chairs, beach umbrellas, on the first day of the week commonly called Sunday in Anne Arundel County.

"§ 521.—Sale, etc., of merchandise on Sunday exceptions.

"(a) *Sunday sales of merchandise prohibited; excepted articles.*—No person in this State shall sell, dispose of, barter, or deal in, or give away any articles of merchandise on Sunday, except retailers, who may sell and deliver on said day tobacco, cigars, cigarettes, candy, sodas, and soft drinks, ice, ice cream, ices and other confectionery, milk, bread, fruits, gasoline, oils and greases.

"(b) *Additional excepted articles in Anne Arundel County; certain establishments excepted.*—In Anne Arundel County, in addition to the articles of merchandise hereinbefore mentioned, retailers, may sell, barter, deal in, and deliver on Sunday the following articles of merchandise: butter, eggs, cream, soap and other detergents, disinfectants, vegetables, meats, and all other food or food stuffs prepared or intended for human consumption, automobile accessories and parts, boating and fishing accessories, artificial and natural flowers and shrubs, toilet goods, hospital supplies, thermometers, camera films, souvenirs, surgical instruments, rubber goods, paper goods, drugs, medicines, patent medicines, and all other articles used for the relief of pain or prescribed by a physician; provided, however, that nothing in this subtitle shall be construed to prevent the operation of any retail establishment on Sunday, the operation of which does not entail the employment of more than one person, not including the owner or proprietor.

"(c) *Penalty for violation; second and subsequent offenses; revocation of license.*—Any person violating any one of the provisions of this section shall be liable

indictment in any court in this State having criminal jurisdiction, and upon conviction thereof shall be fined a sum of not less than twenty nor more than fifty dollars, in the discretion of the Court, for the first offense, and if convicted a second time for a violation of this section, the person or persons so offending shall be fined a sum not less than \$50 nor more than \$500, and be imprisoned for not less than 10 nor more than 30 days, in the discretion of the court, and his, her or their license, if any was issued, shall be declared null and void by the judge of said court; and it shall not be lawful for such person or persons to obtain another license for the period of twelve months from the time of such conviction, nor shall a license be obtained by any other person or persons to carry on said business on the premises or elsewhere, if the person, so as aforesaid convicted, has any interest whatever therein, or shall derive any profit whatever therefrom; and in case of being convicted more than twice for a violation of this section, such person or persons on each occasion shall be imprisoned for not less than thirty nor more than sixty days, and fined a sum not less than double that imposed on such person or persons on the last preceding conviction; and his, her or their license, if any was issued, shall be declared null and void by the court, and no new license shall be issued to such person or persons for a period of two years from the time of such conviction, nor to anyone else to carry on said business wherein he or she is in anywise interested, as before provided for the second violation of the provisions of this section; all the fines to be imposed under this section shall be paid to the State.

“(d) *Apothecaries: sale of newspapers and periodicals*.—This section is not to apply to apothecaries and such apothecaries may sell on Sunday drugs, medicines, and patent medicines as on week days; and this section shall not apply to the sale of newspapers and periodicals.

“§ 522.—*Keeping open or using dancing saloon, opera house, tenpin alley, barber saloon or ball alley on Sunday.*—It shall not be lawful to keep open or use any dancing saloon, opera house, tenpin alley, barber saloon or ball alley within this State on the Sabbath day, commonly called Sunday; and any person or persons, or body politic or corporate, who shall violate any provision of this section, or cause or knowingly permit the same to be violated by a person or persons in his, her or its employ, shall be liable to indictment in any court of this State having criminal jurisdiction, and upon conviction thereof shall be fined a sum not less than fifty dollars nor more than one hundred dollars, in the discretion of the court, for the first offense; and if convicted a second time for a violation of this section, the person or persons, or body politic or corporate shall be fined a sum not less than one hundred nor more than five hundred dollars; and if a natural person shall be imprisoned, not less than ten nor more than thirty days in the discretion of the court; and in the case of any conviction or convictions under this section subsequent to the second, such person or persons, body politic or corporate shall be fined on each occasion a sum at least double that imposed upon him, her, them or it on the last preceding conviction; and if a natural person, shall be imprisoned not less than thirty nor more than sixty days in the discretion of the court; all fines to be imposed under this section shall be paid to the State.

Md. Ann. Code, Art. 2B.

“§ 28.—Anne Arundel County.

“(a) *Special Sunday licenses.*—(1) Notwithstanding any other provision of this article, no license for sale of alcoholic beverages issued by the board of license commissioners for Anne Arundel County (except ‘special licenses’ provided for in § 22 of this Article) shall be

deemed to nor shall it permit or authorize the holder thereof to sell any alcoholic beverages in Anne Arundel County after 2 A. M. on Sundays, except as hereinafter provided.

"(2) Any person holding a license for the sale of alcoholic beverages in Anne Arundel County (except persons holding any Class BP, WP, LP, or LT license, 'Package Goods—off sale license,' 'six day tavern license,' or 'special licenses') issued by the board of license commissioners for Anne Arundel County, shall, upon application made as for new licenses and approval thereof by the board of license commissioners for Anne Arundel County, as provided for by §§ 60 and 67 (c) of this Article, be issued a license to be known as a 'special Sunday license,' upon payment of the fee therefor as provided herein.

"(3) Such 'special Sunday license' shall authorize the holder thereof to sell alcoholic beverages of the same kind, and subject to the same limitations as to hours, alcoholic content of the beverages to be sold thereunder, restrictions and provisions, as govern such other license for the sale of alcoholic beverages, issued to and held by the holder of such 'special Sunday license,' on each Sunday. No 'special Sunday license' shall be issued to any person who does not hold an alcoholic beverage license of some other class issued by the board of license commissioners for Anne Arundel County.

"§ 90—Sundays.—(a) *Bar and counter sales.*—(1) No retail dealer holding a Class B or C license shall be permitted to sell any alcoholic beverage at a bar or counter on Sunday.

"(2) Provided, that in Anne Arundel County it shall be lawful to sell, vend, serve, deliver and/or consume any alcoholic beverages permitted by law to be sold in the first, second, third, fourth, fifth, seventh and eighth districts of Anne Arundel County at any bar or counter on any day

on which the sale of alcoholic beverages is permitted by law.

“(b) *General restrictions.*—(1) In the jurisdictions in which this subsection is applicable, it shall be unlawful for anyone to sell or for any licensed dealer to deliver, give away or otherwise dispose of any alcoholic beverages on Sunday. Any person selling or any licensed dealer delivering, giving away or otherwise disposing of such beverages in such jurisdictions on Sunday shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not exceeding fifty dollars (\$50.00) for the first offense and for each succeeding offense shall be fined not exceeding one hundred dollars (\$100.00), or imprisoned in the county jail for not more than thirty (30) days, or be both fined and imprisoned, in the discretion of the court.

“(2) This subsection shall be applicable and have effect in Caroline, Carroll, Cecil, Dorchester, Garret, Hartford, Kent, Queen Anne's, Somerset, Talbot, Washington, Wicomico and Worcester counties, provided that it shall not apply to or affect special Class C licenses issued under the provisions of this article, nor shall it apply to special Class C licenses issued in Washington County for temporary use.”



# SUPREME COURT OF THE UNITED STATES

Nos. 8, 11, 36 AND 67.—OCTOBER TERM: 1960.

Margaret McGowan, et al.,  
Appellants,

8 v.

Maryland.

On Appeal From the  
Court of Appeals of  
the State of Mary-  
land.

Gallagher, Chief of Police of the  
City of Springfield, Massachu-  
setts, et al., Appellants,

11 v.

Crown Kasher Super Market of  
Massachusetts, Inc., et al.

On Appeal From the  
United States Dis-  
trict Court for the  
District of Massachu-  
setts.

Two Guys From Harrison-Allen-  
town, Inc., Appellant,

36 v.

Paul A. McGinley, District At-  
torney, County of Lehigh,  
Pennsylvania, et al.

On Appeals From the  
United States Dis-  
trict Court for the  
Eastern District of  
Pennsylvania.

Abraham Braunfeld, et al.,  
Appellants,

67 v.

Albert N. Brown, Commis-  
sioner of Police of the City  
of Philadelphia, Pennsylvania,  
et al.

[May 29, 1961.]

MR. JUSTICE DOUGLAS, dissenting.

The question is not whether one day out of seven can be imposed by a State as a day of rest. The question is not whether Sunday can by force of custom and habit be retained as a day of rest. The question is whether a

State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority.

If the "free exercise" of religion were subject to reasonable regulations, as it is under some constitutions, or if all laws "respecting the establishment of religion" were not proscribed, I could understand how rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with any one's free exercise of religion and took no step toward a burdensome establishment of any religion.

But that is not the premise from which we start, as there is agreement that the fact that a State, and not the Federal Government, has promulgated these Sunday laws does not change the scope of the power asserted. For the classic view is that the First Amendment should be applied to the States with the same firmness as it is enforced against the Federal Government. See *Lovell v. Griffin*, 303 U. S. 444, 450; *Minersville District v. Gobitis*, 310 U. S. 586, 593; *Murdock v. Pennsylvania*, 319 U. S. 105, 108; *Board of Education v. Barnette*, 319 U. S. 624, 639; *Staub v. City of Baxley*, 355 U. S. 313, 321; *Talley v. California*, 362 U. S. 60. The most explicit statement perhaps was in *Board of Education v. Barnette*, *supra*, 639.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears

when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

With that as my starting point I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors.

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the state is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect. The Declaration of Independence stated the now familiar theme:

"We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness."

And the body of the Constitution as well as the Bill of Rights enshrined those principles.

The Puritan influence helped shape our constitutional law and our common law as Dean Pound has said: The Puritan "put individual conscience and individual judg-

ment in the first place." The Spirit of the Common Law (1921), p. 42. For these reasons we stated in *Zorach v. Clauson*, 343 U. S. 306, 313, "We are a religious people whose institutions presuppose a Supreme Being."

But those who fashioned the Constitution decided that if and when God is to be served, His service will not be motivated by coercive measures of government. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—such is the command of the First Amendment made applicable to the state by reason of the Due Process Clause of the Fourteenth. This means, as I understand it, that if a religious heaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the government. This necessarily means, *first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; *second*, that no one shall be interfered with by government for practicing the religion of his choice; *third*, that the state may not require anyone to practice a religion or even any religion; and *fourth*, that the state cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters (*Board of Education v. Barnette*, *supra*; *McCullum v. Board of Education*, 333 U. S. 203), not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish—whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral. This free-

dom plainly includes freedom from religion with the right to believe, speak, write, publish and advocate antireligious programs. *Beard of Education v. Barnette, supra*, 641. Certainly the "free exercise" clause does not require that everyone embrace the theology of some church or of some faith, or observe the religious practices of any majority or minority sect. The First Amendment by its "establishment" clause prevents, of course, the selection by government of an "official" church. Yet the ban plainly extends farther than that. We said in *Everson v. Board of Education*, 330 U. S. 1, 16; that it would be an "establishment" of a religion if the government financed one church or several churches. For what better way to "establish" an institution than to find the fund that will support it? The "establishment" clause protects citizens also against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it. The Government plainly could not join forces with one religious group and decree a universal and symbolic circumcision. Nor could it require all children to be baptized or give tax exemptions only to those whose children were baptized.

Could it require a fast from sunrise to sunset throughout the Moslem month of Ramadan? I should think not. Yet why then can it make criminal the doing of other acts, as innocent as eating, during the day that Christians revere?

Sunday is a word heavily overlaid with connotations and traditions deriving from the Christian roots of our civilization that color all judgments concerning it. This is what the philosophers call "word magic."

"For most judges, for most lawyers, for most human beings, we are as unconscious of our value patterns as we are of the oxygen that we breathe." Cohen. *Legal Conscience* (1960), p. 169.

The issue of these cases would therefore be in better focus if we imagined that a state legislature, controlled by orthodox Jews and Seventh Day Adventists, passed a law making it a crime to keep a shop open on Saturdays. Would a Baptist, Catholic, Methodist, or Presbyterian be compelled to obey that law or go to jail or pay a fine? Or suppose Moslems grew in political strength here and got a law through a state legislature making it a crime to keep a shop open on Fridays? Would the rest of us have to submit under the fear of criminal sanctions?

Dr. John Cogley recently summed up<sup>1</sup> the dominance of the three-religion influence in our affairs:

"For the foreseeable future, it seems, the United States is going to be a three-religion nation. At the present time all three are characteristically 'American' some think flavorlessly so. For religion in America is almost uniformly 'respectable,' bourgeois;

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<sup>1</sup> The Problems of Pluralism, Danforth Lectures, Miami University, Oxford, Ohio (1960). Other writers suggest that America is still subject to a customary and nonlegal "protestant establishment" which comes to the surface only on certain political issues. Thus, a Rabbi Arthur Hartzberg was able to analyze the "religious issue" of the recent presidential campaign in these terms:

"As we have seen, the First Amendment was the battleground, at the end of the 18th century, of a major transition in American society in which the old Protestant establishment was forced to yield to the newer ethos of Protestant non-conformity. Today in American society, we are witnessing a change perhaps as important—the full entry of the post-bellum immigrant groups into the national life. Though the battle once again seems to be raging around the First Amendment, it would appear from the foregoing analysis that the true issue is not the separation of church and state, but the symbolic significance for American life and culture of having a non-Protestant—whether he be a Catholic, a Jew, or an avowed atheist—as President of the United States." Hartzberg, "The Protestant 'Establishment,' Catholic Dogma, and the Presidency," *Commentary* (October 1960), p. 285.

and prosperous. In the Protestant world the 'church' mentality has triumphed over the more venturesome spirit of the 'sect.' In the Catholic world, the mystical is muted in favor of booming organization and efficiently administered good works. And in the Jewish world the prophet is too frequently without honor, while the synagogue emphasis is focused on suburban togetherness. There are exceptions to these rules, of course; each of the religious communities continues to cast up its prophets, its rebels and radicals. But a Jeremiah, one fears, would be positively embrarrassing to the present position of the Jews; a Francis of Assisi upsetting the complacency of American Catholics would be rudely dismissed as a fanatic; and a Kierkegaard, speaking with an American accent, would be considerably less welcome than Norman Vincent Peale in most Protestant pulpits."

This religious influence has extended far, far back of the First and Fourteenth Amendments. Every Sunday School student knows the Fourth Commandment:

"Remember the sabbath day, to keep it holy.

"Six days shalt thou labour, and do all thy work:

"But the seventh day is the sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates:

"For in six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the sabbath day, and hallowed it." Exodus 20:8-11.

This religious mandate for observance of the Seventh Day became, under Emperor Constantine, a mandate for observance of the First Day "in conformity with the practice of the Christian Church." See *Richardson v. God-*



*dard*, 23 How. 28, 41. This religious mandate has had a checkered history, but in general its command, enforced now by the ecclesiastical authorities, now by the civil authorities, and now by both, has held good down through the centuries.<sup>2</sup> The general pattern of these laws in the United States was set in the eighteenth century and derives, most directly, from a seventeenth century English statute. 29 Charles II, c. 7. Judicial comment on the Sundays laws has always been a mixed bag. Some judges have asserted that the statutes have a "purely" civil aim, i. e., limitation of work time and provision for a common and universal leisure. But other judges have recognized the religious significance of Sunday and that the laws existed to enforce the maintenance of that significance. In general, both threads of argument have continued to interweave in the case law on the subject. Prior to the time when the First Amendment was held applicable to the States by reason of the Due Process Clause of the Four-

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<sup>2</sup> Blackstone's Commentaries, Bk. IV, c. 4, entitled "Of Offenses Against God and Religion" says in part:

"Profanation of the Lord's day, vulgarly (but improperly) called *sabbath-breaking*, is a ninth offence against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing christianity; and the corruption of morals which usually follows it's profanation, the keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker."

teenth, the Court at least by *obiter dictum* approved State Sunday laws on three occasions: *Soon Hing v. Crowley*, 113 U. S. 703, in 1885; *Hennington v. Georgia*, 163 U. S. 299, in 1896; *Petit v. Minnesota*, 177 U. S. 164, in 1900. And in *Friedman v. New York*, 341 U. S. 907, the Court, by a divided vote, dismissed<sup>3</sup> "for want of a substantial federal question" an appeal from a New York decision upholding the validity of a Sunday law against an attack based on the First Amendment.

The *Soon Hing*, *Hennington*, and *Petit* cases all rested on the police power of the State—the right to safeguard the health of the people by requiring the cessation of normal activities one day out of seven. The Court in the *Soon Hing* case rejected the idea that Sunday laws rested on the power of government "to legislate for the promotion of religious observances." 113 U. S., at 710. The New York Court of Appeals in the *Friedman* case followed the reasoning of the earlier cases.<sup>4</sup> 302 N. Y. 75, 80, 96 N. E. 2d 184, 186.

The Massachusetts Sunday law involved in one of these appeals was once characterized by the Massachusetts court as merely a civil regulation providing for a "fixed period of rest." *Commonwealth v. Has*, 122 Mass. 40, 42. That decision was, according to the District Court in the *Gallagher* case, "an *ad hoc* improvisation" made "because of the realization that the Sunday law would be

<sup>3</sup> See also *Ellner v. Ohio*, 358 U. S. 131; *Kidd v. Ohio*, 358 U. S. 132; *Melton v. North Carolina*, 346 U. S. 802; cf. *Grochotniak v. Pennsylvania*, 358 U. S. 47; *Gundaker Cent. Motors, Inc., v. Gassert*, 354 U. S. 933; *Towery v. North Carolina*, 347 U. S. 925.

<sup>4</sup> As respects the First Amendment the court said: "It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion." 302 N. Y., at 79, 96 N. E. 2d, at 186.

more vulnerable to constitutional attack under the State Constitution if the religious motivation of the statute were more explicitly avowed." 176 F. Supp. 466, 473. Certainly prior to the *Has* case, the Massachusetts courts had indicated that the aim of the Sunday law was religious. See *Pearce v. Atwood*, 13 Mass. 324, 345-346; *Bennett v. Brooks*, 91 Mass. 118, 121. After the *Has* case the Massachusetts court construed the Sunday law as a religious measure. In *Davis v. Somerville*, 128 Mass. 594, 596, 35 Am. Rep. 399, 400, it was said:

"Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time."

And see *Commonwealth v. Dextra*, 143 Mass. 28, 8 N. E. 756. In *Commonwealth v. White*, 190 Mass. 578, 581, 177 N. E. 636, 637, the court refused to liberalize its construction of an exception in its Sunday law for works of "necessity." That word, it said, "was originally inserted to secure the observance of the Lord's day in accordance with the views of our ancestors, and it ever since has stood and still stands for the same purpose." In *Commonwealth v. McCarthy*, 244 Mass. 484, 486, 138 N. E. 835, 836, the court reiterated that the aim of the law was "to secure respect and reverence for the Lord's day."

The Pennsylvania Sunday laws before us in Nos. 36 and 67 have received the same construction. "Rest and quiet, on the Sabbath day, with the right and privilege of public and private worship, undisturbed by any mere wordly employment, are exactly what the statute was

passed to protect." *Sparhawk v. Union Passenger R. Co.*, 54 Pa. 401, 423. And see *Commonwealth v. Nesbit*, 34 Pa. 398, 405, 406-408. A recent pronouncement by the Pennsylvania Supreme Court is found in *Commonwealth v. American Baseball Club*, 290 Pa. 136, 143, 138 A. 497, 499: "Christianity is part of the common law of Pennsylvania . . . and its people are christian people. Sunday is the holy day among christians."

The Maryland court in sustaining the challenged law in No. 8 relied on *Judefind v. State*, 78 Md. 510, 28 A. 405, and *Levering v. Park Commissioner*,<sup>5</sup> 134 Md. 48, 106 A. 176. In the former the court said:

"It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion—of all sects and denominations that observe that day—as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a Court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, (except works of necessity and charity,) and *thereby* promotes the cause of Christianity. If the Christian religion is, incidentally or otherwise, benefited or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it." 78 Md., at 515-516, 128 A., at 407.

In the *Levering* case the court relied on the excerpt from the *Judefind* decision just quoted. 134 Md., at 54-56, 106 A., at 178-179.

We have then in each of the four cases Sunday laws that find their source in Exodus, that were brought here

<sup>5</sup>Cf. *Bowman v. Secular Society, Ltd.* [1917] A. C. 406, 464 (opinion of Lord Sumner).

by the Puritans, and that are today maintained, construed, and justified because they respect the views of our dominant religious groups and provide a needed day of rest.

The history was accurately summarized a century ago by Chief Justice Terry of the Supreme Court of California in *Ex parte Newman*, 9 Cal. 502, 509.

"The truth is, however much it may be disguised, that this one day of rest is a purely religious idea. Derived from the Sabbatical institutions of the ancient Hebrew, it has been adopted into all the creeds of succeeding religious sects throughout the civilized world; and whether it be the Friday of the Mohammedan, the Saturday of the Israelite, or the Sunday of the Christian, it is alike fixed in the affections of its followers, beyond the power of eradication, and in most of the States of our Confederacy, the aid of the law to enforce its observance has been given under the pretence of a civil, municipal, or police regulation."

That case involved the validity of a Sunday law under a provision of the California Constitution guaranteeing the "free exercise" of religion. Calif. Const., 1849, Art. I. § 4. Justice Burnett stated why he concluded that the Sunday law, there sought to be enforced against a man selling clothing on Sunday, infringed California's constitution:

"Had the act made Monday, instead of Sunday, a day of compulsory rest, the constitutional question would have been the same. The fact that the Christian *voluntarily* keeps holy the first day of the week, does not authorize the Legislature to make that observance *compulsory*. The Legislature can not compel the citizen to do that which the Constitution leaves him free to do or omit, at his election. The

act violates as much the religious freedom of the Christian as of the Jew. Because the conscientious views of the Christian compel him to keep Sunday as a Sabbath, he has the right to object, when the Legislature invades his freedom of religious worship, and assumes the power to compel him to do that which he has the right to omit if he pleases. The principle is the same, whether the act of the Legislature *compels* us to do that which we wish to do, or not to do. . . .

"Under the Constitution of this State, the Legislature can not pass any act, the legitimate effect of which is *forcibly* to establish any merely religious truth, or enforce any merely religious observances. The Legislature has no power over such a subject. When, therefore, the citizen is sought to be compelled by the Legislature to do any affirmative religious act, or to refrain from doing anything, because it violates simply a religious principle or observance, the act is unconstitutional." *Id.*, at 513-515.

The Court picks and chooses language from various decisions to bolster its conclusion that these Sunday Laws in the modern setting are "civil regulations." No matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment<sup>5</sup>; and they serve and satisfy the religious predispositions of our Christian communities.<sup>6</sup> After all, the labels a State places on its laws are not binding on us when we are confronted with a constitutional decision. We reach our

<sup>5</sup> Today we retreat from that jealous regard for religious freedom which struck down a statute because it was "a handy implement for disguised religious persecution." *Board of Education v. Barnette*, *supra*, 644 (concurring opinion). It does not do to say, as does the majority, "Sunday is a day apart from all others. The cause is irrelevant; the fact exists." The cause of Sunday's being a



own conclusion as to the character, effect, and practical operation of the regulation in determining its constitutionality. *Carpenter v. Shaw*, 280 U. S. 363, 367-368; *Dyer v. Sims*, 341 U. S. 22, 29; *Memphis Steam Laundry v. Stone*, 342 U. S. 389, 392; *Society for Savings v. Bowers*, 349 U. S. 143, 151; *Gomillion v. Lightfoot*, 364 U. S. 339, 341-342.

It seems to me plain that by these laws the States compel one, under sanction of law, to refrain from work or recreation on Sunday because of the majority's religious views about that day. The State by law makes Sunday a symbol of respect or adherence. Refraining from work or recreation in deference to the majority's religious feelings about Sunday is within every person's choice. By what authority can government compel it?

Cases are put where acts that are immoral by our standards but not by the standards of other religious groups are made criminal. That category of cases, until today, has been a very restricted one confined to polygamy (*Reynolds v. United States*, 98 U. S. 145) and other extreme situations. The latest example is *Prince v. Massachusetts*, 321 U. S. 158, which upheld a statute making it criminal for a child under twelve to sell papers, periodicals, or merchandise on a street or in any public place. It was sustained in spite of the finding that the child thought it was her religious duty to perform the

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day apart is determinative; that cause should not be swept aside by a declaration of parochial experience.

The judgment the Court is called upon to make is a delicate one. But in the light of our society's religious history it cannot be avoided by arguing that a hypothetical legislator could find nonreligious reasons for fixing Sunday as a day of rest. The effect of that history is, indeed, still with us. Sabbath is no less Sabbath because it is now less severe in its strictures, or because it has come to be expedient for some nonreligious purposes. The Constitution must guard against "sophisticated as well as simple-minded modes" of violation. *Lane v. Wilson*, 307 U. S. 268, 275.



act. But that was a narrow holding which turned on the effect which street solicitation might have on the child-solicitor:

"The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action." *Id.*, 168-169.

None of the acts involved here implicates minors. None of the actions made constitutionally criminal today involves the doing of any act that any society has deemed to be immoral.

The conduct held constitutionally criminal today embraces the selling of pure, not impure, food; wholesome, not noxious articles. Adults, not minors, are involved. The innocent acts, now constitutionally classified as criminal, emphasize the drastic break we make with tradition.

These laws are sustained because, it is said, the First Amendment is concerned with religious convictions or opinion, not with conduct. But it is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome

and not antisocial, does not defer to the majority's religious beliefs. Some have religious scruples against eating pork. Those scruples, no matter how bizarre they might seem to some, are within the ambit of the First Amendment. See *United States v. Ballard*, 322 U. S. 78, 87. Is it possible that a majority of a state legislature having those religious scruples could make it criminal for the nonbeliever to sell pork? Some have religious scruples against slaughtering cattle. Could a state legislature, dominated by that group, make it criminal to run an abattoir?

The Court balances the need of the people for rest, recreation, late-sleeping, family visiting and the like against the command of the First Amendment that no one need bow to the religious beliefs of another. There is in this realm no room for balancing. I see no place for it in the constitutional scheme. A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected—unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause. Any other reading imports, I fear, an element common in other societies but foreign to us. Thus Nigeria in Article 23 of her Constitution, after guaranteeing religious freedom, adds, "Nothing in this section shall invalidate any law that is reasonably justified in a democratic society in the interest of defence, public safety, public order, public morality, or public health." And see Article 25 of the Indian Constitution. That may be a desirable provision. But when the Court adds it to our First Amendment, as it does today, we make a sharp break with the American ideal of religious liberty as enshrined in the First Amendment.

The State can of course require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement.<sup>7</sup> Then the "day of rest" becomes purely and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the "weaker brethren," to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed, if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?

There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the "free exercise" of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of those laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as their Sabbath a day other than Sunday.

When these laws are applied to Orthodox Jews, as they are in No. 11 and in No. 67, or to Sabbatarians their vice is accentuated. If the Sunday laws are constitutional, Kosher markets are on a five-day week. Thus those laws put an economic penalty on those who observe Saturday

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<sup>7</sup> Or the State may merely fix a maximum hours limitation in other terms: either for particular classes of employees, particular classes of employment, or straight across the board. See laws and decisions gathered in 1 & 2 CCH Labor Law Reporter, State Laws, par. 44,500 *et seq.* On argument, there was much made over the desirability of fixing a single day for rest, either on grounds of administrative convenience or on grounds of the need for leisure. In light of the history and meaning of the shared leisure of Sunday, this aim still has religious overtones. Cf. *Joseph Burstyn, Inc., v. Wilson*, 343 U. S. 495, 505.

rather than Sunday as the Sabbath. For the economic pressures on these minorities, created by the fact that our communities are predominantly Sunday-minded, there is no recourse. When, however, the State uses its coercive powers—here the criminal law—to compel minorities to observe a second Sabbath, not their own, the State undertakes to aid and “prefer one religion over another”—contrary to the command of the Constitution. See *Everson v. Board of Education*, *supra*, 15.

In large measure the history of the religious clause of the First Amendment was a struggle to be free of economic sanctions for adherence to one's religion. *Everson v. Board of Education*, *supra*, 11–14. A small tax was imposed in Virginia for religious education. Jefferson and Madison led the fight against the tax, Madison writing his famous Memorial and Remonstrance against that law. *Id.*, 12. As a result, the tax measure was defeated and instead Virginia's famous “Bill for Religious Liberty,” written by Jefferson, was enacted. *Id.*, 12. That Act provided: \*

“That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . .”

The reverse side of an “establishment” is a burden on the “free exercise” of religion. Receipt of funds from the state benefits the established church directly; laying an extra tax on nonmembers benefits the established church indirectly. Certainly the present Sunday laws place Orthodox Jews and Sabbatarians under extra burdens because of their religious opinions or beliefs. Requiring them to abstain from their trade or business on Sunday

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\* 12 Hennings, Stat. Va. (1823), p. 86.

reduces their work-week to five days, unless they violate their religious scruples. This places them at a competitive disadvantage and penalizes them for adhering to their religious beliefs.

"The sanction imposed by the state for observing a day other than Sunday as holy time is certainly more serious economically than the imposition of a license tax for preaching,"<sup>9</sup> which we struck down in *Murdock v. Pennsylvania*, 319 U. S. 105, and in *Follett v. McCormick*, 321 U. S. 573. The special protection which Sunday laws give the dominant religious groups and the penalty they place on minorities whose holy day is Saturday constitute in my view state interference with the "free exercise" of religion.<sup>10</sup>

I dissent from applying criminal sanctions against any of these complainants since to do so implicates the States in religious matters contrary to the constitutional

<sup>9</sup> Pfeffer, *Church, State, and Freedom* (1953), p. 235.

<sup>10</sup> "... assuming that the idle Sunday is an 'Institution' of Christianity, does a statute which for that reason requires men to be idle on Sunday give a preference to one particular religion? How can it be maintained that it does not, unless a similar institution of every other religion be honored with like recognition? As to the individual aspect of the case, if the law is to assist Christianity by making idleness compulsory on its sacred day, thereby presumably commending it to those who reject it, and strengthening its hold upon its devotees, is there not a 'preference' given to a religion, unless the Hebrew and all other faiths have a like recognition extended to their sacred days? And as to the social aspect, assuming that it is an advantage to have other people kept extraordinarily quiet while we pray, and to have an especial 'peace' established by law on the day we select for public worship, and that we have the right to prevent our neighbor from earning his living at a certain time because the practice of his avocation interferes with our religious exercises, must it not be called a 'preference' to do all this for the Christian's benefit, and not to do it for the benefit of the followers of Moses, or Mahomet, or Confucius or Buddha?" Ringgold, *Legal Aspects of the First Day of the Week* (1891), pp. 68-69.

mandate.<sup>11</sup> Allan C. Parker, Jr., Pastor of the South Park Presbyterian Church, Seattle, Washington, has stated my views:

"We forget that, though Sunday-worshipping Christians are in the majority in this country among religious people, we do not have the right to force our practice upon the minority. Only a Church which deems itself without error and intolerant of error can justify its intolerance of the minority.

"A Jewish friend of mine runs a small business establishment. Because my friend is a Jew he closes his store voluntarily so that he will be able to worship his God in his fashion. Fine! But, as a Jew living under Christian inspired Sunday closing laws, he is required to close his store on Sunday so that I will be able to worship my God in my fashion.

"Around the corner from my church there is a small Seventh Day Baptist church. I disagree with the Seventh Day Baptists on many points of doctrine. Among the tenets of their faith with which I disagree is the 'seventh day worship.' But they are

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<sup>11</sup> It is argued that the wide acceptance of Sunday laws at the time of the adoption of the First Amendment makes it fair to assume that they were never thought to come within the "establishment" Clause, and that the presence in the country at that time of large numbers of Orthodox Jews makes it clear that those laws were not thought to run afoul of the "free exercise" Clause. Those reasons would be compelling if the First Amendment had, at the time of its adoption, been applicable to the States. But since it was then applicable only to the Federal Government, it had no possible bearing on the Sunday laws of the States. The Fourteenth Amendment, adopted years later, made the First Amendment applicable to the States for the first time. That Amendment has had unsettling effects on many customs and practices—a process consistent with Jefferson's precept "that laws and institutions must go hand in hand with the progress of the human mind." 15 The Writings of Thomas Jefferson (Memorial ed. 1904) p. 41.

good neighbors and fellow Christians, and while we disagree we respect one another. The good people of my congregation set aside their jobs on the first of the week and gather in God's house for worship. Of course it is easy for them to set aside their jobs since Sunday-closing laws—inspired by the Church—keep them from their work. At the Seventh Day Baptist church the people set aside their jobs on Saturday to worship God. This takes real sacrifice because Saturday is a good day for business. But that is not all—they are required by law to set aside their jobs on Sunday while more orthodox Christians worship.

"I do not believe that because I have set aside Sunday as a holy day I have the right to force all man to set aside that day also. Why should my faith be favored by the State over any other man's faith?"<sup>12</sup>

With all deference none of the opinions filed today in support of the Sunday laws have answered that question.

<sup>12</sup>1 Liberty, January-February 1961, pp. 21-22.



# SUPREME COURT OF THE UNITED STATES

Nos. 8, 11, 36 AND 67.—OCTOBER TERM, 1960.

8	Margaret McGowan, et al., Appellants. v. Maryland.	On Appeal From the Court of Appeals of the State of Mary- land.
11	Gallagher, Chief of Police of the City of Springfield, Massachu- setts, et al., Appellants. v. Crowl, Kosher Super Market of Massachusetts, Inc., et al.	On Appeal From the United States Dis- trict Court for the District of Massachu- setts.
36	Two Guys From Harrison-Allen- town, Inc., Appellant. v.	
67	Paul A. McGinley, District At- torney, County of Lehigh, Pennsylvania, et al. v. Abraham Braunfeld, et al., Appellants.	On Appeals From the United States Dis- trict Court for the Eastern District of Pennsylvania.
	Albert N. Brown, Commis- sioner of Police of the City of Philadelphia, Pennsylvania, et al.	

[May 29, 1961.]

Separate opinion of MR. JUSTICE FRANKFURTER, whom  
MR. JUSTICE HARLAN joins.

So deeply do the issues raised by these cases cut that  
it is not surprising that no-one opinion can wholly express

the views even of all the members of the Court who join in its result. Individual opinions in constitutional controversies have been the practice throughout the Court's history.\* Such expression of differences in view or even in emphasis converging toward the same result makes for the clarity of candor and thereby enhances the authority of the judicial process.

For me considerations are determinative here which call for separate statement. The long history of Sunday legislation, so decisive if we are to view the statutes now attacked in a perspective wider than that which is furnished by our own necessarily limited outlook, cannot be conveyed by a partial recital of isolated instances or events. The importance of that history derives from its continuity and fullness—from the massive testimony which it bears to the evolution of statutes controlling Sunday labor and to the forces which have, during three hundred years of Anglo-American history at the least, changed those laws, transmuted them, made them the vehicle of mixed and complicated aspirations. Since I find in the history of these statutes insights controllingly relevant to the constitutional issues before us, I am constrained to set that history forth in detail. And I also

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\* "In pursuance of my practice in giving an opinion on all constitutional questions, I must present my views on this." Mr. Justice Johnson, concurring, in *Cherokee Nation v. Georgia*, 5 Pet. 1, 20. See Mr. Justice Story, dissenting, in *Briscoe v. Bank of the Commonwealth of Kentucky*, 11 Pet. 257, 329; Mr. Chief Justice Taney, dissenting, *Rhode Island v. Massachusetts*, 12 Pet. 657, 752. And see Mr. Justice Bradley, concurring, in the *Legal Tender Cases*, 12 Wall. 457, 554: "I . . . should feel that it was out of place to add anything further on the subject were it not for its great importance. On a constitutional question involving the powers of the government it is proper that every aspect of it, and every consideration bearing upon it, should be presented, and that no member of the court should hesitate to express his views."

deem it incumbent to state how I arrive at concurrence with THE CHIEF JUSTICE'S principal conclusions without drawing on *Everson v. Board of Education*, 330 U. S. 1.

## I.

Because the long colonial struggle for disestablishment—the struggle to free all men, whatever their theological views, from state-compelled obligation to acknowledge and support state-favored faiths—made indisputably fundamental to our American culture the principle that the enforcement of religious belief as such is no legitimate concern of civil government, this Court has held that the Fourteenth Amendment embodies and applies against the States freedoms that are loosely indicated by the not rigidly precise but revealing phrase “separation of church and state.” *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203. The general principles of church-state separation were found to be included in the Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of “liberty” protected by the clause. This is the source of the limitations imposed upon the States. To the extent that those limitations are akin to the restrictions which the First Amendment places upon the action of the central government, it is because—as with the freedom of thought and speech of which Mr. Justice Cardozo spoke in *Palko v. Connecticut*, 302 U. S. 319—it is accurate to say concerning the principle that a government must neither establish nor suppress religious belief, that “With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.” *Id.*, at 327.

But the several opinions in *Everson* and *McCollum*, and in *Zorach v. Clauson*, 343 U. S. 306, make sufficiently clear that “separation” is not a self-defining concept.

"[A]greement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between church and State,' does not preclude a clash of views as to what the wall separates." *Illinois ex rel. McCollum v. Board of Education, supra*, at 213 (concurring opinion). By its nature, religion—in the comprehensive sense in which the Constitution uses that word—is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives. Religious beliefs pervade, and religious institutions have traditionally regulated, virtually all human activity. It is a postulate of American life, reflected specifically in the First Amendment to the Constitution but not there alone, that those beliefs and institutions shall continue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their many influences upon men's conduct, free of the dictates and directions of the state. However, this freedom does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation. As the state's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.

Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue. Nor do such regulations, in their coincidence with tenets of faith, always support equally the beliefs of all religious sects: witness the civil laws forbidding usury and enforcing monogamy. Because these laws serve

ends which are within the appropriate scope of secular state interest, they may be enforced against those whose religious beliefs do not proscribe, and even sanction, the activity which the law condemns. *Reynolds v. United States*, 98 U. S. 145; *Davis v. Beason*, 133 U. S. 333; *Cleveland v. United States*, 329 U. S. 14. —

This is not to say that governmental regulations which find support in their appropriateness to the achievement of secular, civil ends are invariably valid under the First or Fourteenth Amendments, whatever their effects in the sphere of religion. If the value to the state of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained. *Cantwell v. Connecticut*, 310 U. S. 296. This was the ground upon which the Court struck down municipal license taxes as applied to religious colporteurs in *Follett v. Town of McCormick*, 321 U. S. 573; *Murdock v. Pennsylvania*, 319 U. S. 105, and *Jones v. Opelika*, 319 U. S. 103. In each of those cases it was believed that the States' need for revenue, which could be satisfied by taxing any of a variety of sources, did not justify a levy imposed upon an activity which in the light of history could reasonably be viewed as sacramental. But see *Cox v. New Hampshire*, 312 U. S. 569, in which the Court, balancing the public benefits secured by a regulatory measure against the degree of impairment of individual conduct expressive of religious faith which it entailed, sustained the prohibition of an activity similarly regarded by its practitioners as sacramental. And see *Prince v. Massachusetts*, 321 U. S. 158.

Within the discriminating phraseology of the First Amendment, distinction has been drawn between cases raising "establishment" and "free exercise" questions. Any attempt to formulate a bright-line distinction is bound to founder. In view of the competition among religious creeds, whatever "establishes" one sect disadvantages another, and vice versa. But it is possible historically and therefore helpful analytically—no less for problems arising under the Fourteenth Amendment, illuminated as that Amendment is by our national experience, than for problems arising under the First—to isolate in general terms the two largely overlapping areas of concern reflected in the two constitutional phrases, "establishment" and "free exercise," and which emerge more or less clearly from the background of events and impulses which gave those phrases birth.

In assuring the free exercise of religion, the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience.<sup>2</sup> This protection of unpopular creeds, however,

<sup>1</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." Madison had proposed an amendment that "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Annals of Cong.* 434. Commenting on a subsequent form of what was to become the First Amendment, he said that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.*, at 730.

<sup>2</sup> See Cobb, *The Rise of Religious Liberty in America* (1902), *passim*; Sweet, *The Story of Religion in America* (rev. ed. 1939), 54, 76-77, 98-112, 129, 139-142; Sweet, *Religion in Colonial America*

was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith. The battle in Virginia, hardly four years won, where James Madison had led the forces of disestablishment in successful opposition to Patrick Henry's proposed Assessment Bill, levying a general tax for the support of Christian teachers, was a vital and compelling memory in 1789. The lesson of that battle, in the words of Jefferson's Act for Establishing Religious Freedom, whose passage was its verbal embodiment, was "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of

(1942), *passim*; I Channing, *History of the United States* (1933), 356-381, 470-474. And see Jefferson's Notes on Virginia, in II Writings of Thomas Jefferson (Memorial ed. 1903) 217-249. The Virginia Convention which ratified the Federal Constitution proposed as a needed amendment to it: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others." III Elliot's Debates (2d ed. 1836) 659. See also the amendment proposed by the North Carolina Convention which declined to ratify, IV *id.*, at 244, and the understanding of the Constitution expressed by Rhode Island, I *id.*, at 334, and New York, I *id.*, at 328. Cf. the amendment proposed by New Hampshire, I *id.*, at 326.

\* See James, *The Struggle for Religious Liberty in Virginia* (1900); Eckenrode, *Separation of Church and State in Virginia* (1910); Randall, *Life of Thomas Jefferson* (1858), 219-223; Cobb, *The Rise of Religious Liberty in America*, (1902), 400-499; Sweet, *The Story of Religion in America* (rev. ed. 1939), 276-279.

\* The history of the Virginia episode is treated extensively in the opinions in *Everson v. Board of Education*, 330 U. S. 1.



giving his contributions to the particular pastor; whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporal rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind . . . ."<sup>5</sup> What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each. The purpose of the Establishment Clause was to assure that the national legislature would not exert its power, in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation.

Of course, the immediate object of the First Amendment's prohibition was the established church as it had been known in England and in most of the Colonies. But with foresight those who drafted and adopted the words: "Congress shall make no law respecting an establishment of religion," did not limit the constitutional proscription to any particular, dated form of state-supported theological venture. The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. Neither the National Government nor, under the Due Process Clause of the

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<sup>5</sup> 12 Hening, Statutes of Virginia (1823), 84, 85.

Fourteenth Amendment, a State, may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the state is served, or because a majority of its citizens, holding that belief, are offended when all do not hold it.

With regulations which have other objectives the Establishment Clause, and the fundamental separationist concept which it expresses, are not concerned. These regulations may fall afoul of the constitutional guarantee against infringement of the free exercise or observance of religion. Where they do, they must be set aside at the instance of those whose faith they prejudice. But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious "establishment" is satisfied.

To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCullum*. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison*

*d'être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce v. Society of Sisters*, 268 U. S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional "establishment," even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone. The close division of the Court in *Everson* serves to show what nice questions are involved in applying to particular governmental action the proposition, undeniable in the abstract, that not every regulation some of whose practical effects may facilitate the observance of a religion by its adherents, affronts the requirement of church-state separation.

In an important sense, the constitutional prohibition of religious establishment is a provision of more comprehensive availability than the guarantee of free exercise, insofar as both give content to the prohibited fusion of church and state. The former may be invoked by the corporate operator of a seven-day department store whose state-compelled Sunday closing injures it financially—or by the department store's employees, whatever their faith, who are convicted for violation of a Sunday statute—as well as by the Orthodox Jewish retailer or consumer who claims that the statute prejudices him in his ability to keep his faith. But it must not be forgotten that the question which the department store

operator and employees may raise in their own behalf is narrower than that posed by the case of the Orthodox Jew." Their "establishment" contention can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear. See *Selective Draft Law Cases*, 245 U. S. 367.

In the present cases the Sunday retail sellers and their employees and customers, in attacking statutes banning various activities on a day which most Christian creeds consecrate, do assert that these statutes have no other purpose. They urge, first, that the legislators' motives were religious. But the private and unformulated influences which may work upon legislation are not open to judicial probing. "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, 195 U. S. 27, 56. "Inquiry into the hidden

\*As appellant retailers and retail employees in the *McGowan* and *McGinley* cases have urged neither here nor below any question of infringement of their own rights of conscience, I agree with THE CHIEF JUSTICE that they have no standing to raise the "free exercise" issue. *United States v. Raines*, 362 U. S. 17. The Court need not determine at this time what averments or what proofs, in a proper case, would be required in order to raise such issues in their behalf. Unlike appellants in *Braunfeld* and appellees in *Gallagher*, they have not urged that their remaining shut on any day of the week for any reason causes Sunday closing to disadvantage them peculiarly. They assert a right to operate seven days a week—a right in which they claim an economic, not a conscientious interest. Nor, on this record, is it necessary to decide whether these Sunday retail sellers might have standing to complain of the disadvantage of their enforced Sunday closing to conscientious Sabbatarian customers or potential customers. Cf. *Barrows v. Jackson*, 346 U. S. 249; *Pierce v. Society of Sisters*, 268 U. S. 510. Nowhere below have they presented evidence that any such actual or hypothetical customer is thus disadvantaged.

motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky v. United States*, 300 U. S. 506, 513-514. *Veazie Bank v. Fenner*, 8 Wall. 533; *Arizona v. California*, 283 U. S. 423; *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508. These litigants also argue, however, that when the state statutory provisions are regarded in their legislative context religion is apparent on their face: they point to the use of the terms "Lord's day" and "Sabbath" and "desecration," to exceptions whose hours permit activities only at times on Sunday when religious services are customarily not held, to explicit prohibition of otherwise permitted activity in the vicinity of churches, to regulations which condition the allowance of conduct on its consistency with the "due observance" of the day. Of course, since these various provisions regarding exemption from the Sunday ban of certain recreational activities have no possible application to the litigants in the present cases, they are not themselves before the Court, and their constitutionality is not now in issue. But they are put forward as evidence of the purpose of the statutes which are attacked here, and as such we may properly look to them, and also to the history of the body of state Sunday regulations, which, it is urged, further demonstrates sectarian creedal purpose. As a basis for appraising these arguments that the statutes are religious legislation, and preliminary to determining the claims of infringement of conscience raised in the *Gallagher* and *Braunfeld* cases, it is necessary to survey the long-historical development and present-day position of civil Sunday regulation.

## II.

For these purposes the span of centuries which saw the enunciation of the Fourth Commandment, Constantine's

<sup>1</sup> See Exodus 20:8-11, 23:12, 31:12-17; Deuteronomy 5:12-15

edict proscribing labor on the venerable day of the Sun, and the Sunday prohibitions of Carlövingian, Merovingian and Saxon rulers, and later of the English kings of the thirteenth and fourteenth centuries, may be passed over." What is of concern here is the Sunday institution as it evolved in modern England, the American Colonies, and the States of the Union under the Constitution. The first significant English Sunday regulation, for this purpose, was the statute of Henry VI in 1448 which, after reciting "the abominable injuries and offences done to Almighty God, and to his Saints, . . . because of fairs and markets upon their high and principal feasts, . . . in which principal and festival days, for great earthly covetise, the people is more willingly vexed, and in bodily labour soiled, than in other . . . days, . . . as though they did nothing remember the horrible defiling of their souls in buying and selling, with many deceitful lies and false perjury, with drunkenness and strifes, and so specially withdrawing themselves and their servants from divine service . . ." ordained that all fairs and markets should cease to show forth goods or merchandise on Sundays, Good Friday, and the principal feast days.<sup>10</sup> A short-lived ordinance of Edward VI a century later, limiting the ban on bodily labor to Sundays and enumerated holy days, demonstrated in its preamble a similar sec-

<sup>10</sup> Codex Justin., liber III, Tit. XII, 3. See H. Schaff, History of the Christian Church (1867), 380, n. 1. Later edicts of the emperors were more unequivocally Christian in temper, *e. g.*, that of 386 A. D., Codex Theo., liber VIII, Tit. VIII, 3. See Pharr, The Theodosian Code (1952), 209.

<sup>11</sup> See Lewis, A Critical History of Sunday Legislation (1888), 1-90; Neale, Feasts and Fasts (1845), 86-137; Johnson and Yost, Separation of Church and State (1948), 219-221; XII-Encyclopedia of Religion and Ethics (Hastings ed. 1921), 103-106; Savage, Sunday in Church History, in How Shall We Keep Sunday (1898), 27.

<sup>12</sup> 27 Henry VI, c. 5.

tarian purpose," and in 1625 Charles I. announcing that "there is nothing more acceptable to God than the true and sincere service and worship of him . . . and that the holy keeping of the Lord's day is a principal part of the true service of God," prohibited all meetings of the people out of their parishes for sports and pastimes on Sunday, and all bear-baiting, bull-baiting, interludes, common plays, and other unlawful exercises and pastimes on that day.<sup>11</sup> Several years later the same king declared it reproachful of God and religion, and hence made it unlawful, for butchers to slaughter or carriers, drovers, waggoners, etc., to travel on the Lord's day;<sup>12</sup> then, in 1677,<sup>13</sup> "For the better Observation and keeping Holy the Lord's Day," the statute, 29 Charles II. c. 7, which is

"5 & 6 Edw. VI. c. 3. "Forasmuch as at all times men be not so mindful to laud and praise God, so ready to resort and hear God's holy word, and to come to the holy communion and other laudable rites, which are to be observed in every christian congregation, as their bounden duty doth require: . . . therefore to call men to remembrance of their duty, and to help their infirmity, it hath been wholsomly provided, that there should be some certain times and days appointed, wherein the christian should cease from all other kind of labours, and should apply themselves only and wholly unto the aforesaid holy works, properly pertaining unto true religion . . .

Violations were to be punished by the censures of the church, administered by the bishops, archbishops and other persons having ecclesiastical jurisdiction. The purpose of this ordinance was apparently to restrict to a fixed and relatively limited number the days upon which labor should cease, the multiplication of saints' days having risen until they came to consume an alarming proportion of the year. It was repealed under Queen Mary.

<sup>12</sup> 1. Charles I. c. 1. This regulation, while prescribing civil penalties, preserved the concurrent jurisdiction of the ecclesiastical courts to punish Sabbath breaking.

<sup>13</sup> 3 Charles I. c. 2.

<sup>14</sup> For a survey of the extensive Sunday regulations promulgated under the Commonwealth, see Lewis, *op. cit. supra*, note 9, at 115-142.



still the basic Sunday law of Britain, was enacted: "that all and every Person and Persons whatsoever, shall on every Lord's Day apply themselves to the Observation of the same, by exercising themselves thereon in the Duties of Piety and true Religion, publicly and privately; . . . and that no Tradesman, Artificer, Workman, Labourer or other Person whatsoever, shall do or exercise any worldly Labour, Business or Work of their ordinary Callings, upon the Lord's Day, or any part thereof (Works of Necessity and Charity only excepted;) . . . and that no Person or Persons whatsoever, shall publicly cry, shew forth, or expose to Sale, any Wares, Merchandizes, Fruit, Herbs, Goods or Chattels whatsoever; upon the Lord's Day . . ." <sup>15</sup> In 1781, a statute, 21 Geo. III, c. 49, reciting that various public entertainments and explanations of scriptural texts by incompetent persons tended "to the great encouragement

Work was punished by penalty of five shillings, selling by forfeiture of the goods. The ban against butchers and herders traveling on Sunday was repeated, under fine of twenty shillings. Dressing of meat in families and dressing or selling of meat in inns and victualing houses "for such as otherwise cannot be provided," was permitted, as was the crying or selling of milk before 9 a. m. and after 4 p. m. Later statutes made numerous other exceptions to the English Sunday ban: see, e. g., 9 Anne, c. 23, § 20, exempting hackney coaches; the Sunday Entertainments Act, 1932, 22 & 23 Geo. V, c. 51, exempting motion pictures at the option of local authority and under stipulated conditions, and also making lawful certain musical entertainments, lectures and debates, and the operation of museums, galleries, zoological and botanical gardens, etc.; and the evolving regulation of Sunday baking, 34 Geo. III, c. 61; 1 & 2 Geo. IV, c. 50, § 11; 3 Geo. IV, c. 106, § 16; 6 & 7 Wm. IV, c. 37, § 14; Baking Industry (Hours of Work) Act, 1954, 2 & 3 Eliz. II, c. 57, § 12. The Sunday Observation Prosecution Act, 1871, 34 & 35 Vict., c. 87, provided that no prosecutions under the statute, 20 Charles II, c. 7, might be brought without the consent of a chief police officer, a stipendiary magistrate, or two justices of the peace.

of irreligion and profaneness," closed all rooms and houses in which public entertainment, amusement or debates, for an admission charge, were held.<sup>16</sup>

These Sunday laws were indisputably works of the English Establishment. Their prefatory language spoke their religious inspiration,<sup>17</sup> exceptions made from time to time were expressly limited to preserve inviolable the hours of the divine service,<sup>18</sup> and in their administration

<sup>16</sup> Common informer practice under this statute has since been abolished. Common Informers Act, 1951, 14 & 15 Geo. VI, c. 39.

<sup>17</sup> See *Fennell v. Ridler*, 5 B. & C. 406, 407-408 (1826): "The spirit of the act [of 29 Charles II] is to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit unless it is so construed as to check the career of worldly traffic. . . . Labour may be private and not meet the public eye, and so not offend against public decency, but it is equally labour, and equally interferes with a man's religious duties."

<sup>18</sup> The Book of Sports published by James I in 1618 and republished by Charles I in 1633 provided: "as for our good people's lawful recreation, our pleasure . . . is, that after the end of divine service our good people be not disturbed . . . from any lawful recreation, such as dancing, . . . leaping, vaulting, or any other such harmless recreation . . . ."

"And likewise we bar from the benefit and liberty all such known recusants, either men or women, as will abstain from coming to church or divine service, being therefore unworthy of any lawful recreation after said service, that will not first come to church and serve God. Prohibiting in like sort the said recreations to any that, though conform in religion, are not present in the church at the service of God, before their going to the said recreations."

"Our pleasure, likewise is, that they to whom it belongeth in office, shall present and punish sharply all such, as in abuse of this our liberty will use their exercises before the end of all divine services for that day." Lewis, *op. cit.*, *supra*, note 9, at 106-107. See Govett, *The King's Book of Sports* (1890). See also the excepting proviso to the statute, 10 & 11 Wm. III c. 24, § 14, respecting Billingsgate Market. Certain importation and selling of fish "before or after Divine Service on Sundays" is not to be deemed prohibited.

a spirit of inquisitorial piety was evident.<sup>19</sup> But even in this period of religious predominance, notes of a secondary civil purpose could be heard. Apart from the counsel of those who had from the time of the Reformation insisted that the Fourth Commandment itself embodied a precept of social rather than sacramental significance,<sup>20</sup> claims

<sup>19</sup> Such a spirit may be seen in various royal proclamations enjoining strict enforcement of the Sunday laws, see Whitaker, *The Eighteenth-Century English Sunday* (1940), 56, 172-173, and in the language of charges to the grand juries encouraging their performance of their duties under the laws, see *id.*, at 53, 57-58. Private societies formed as self-appointed agents of administration of the Sunday laws were religious in orientation. See, *id.*, at 62, 69, 121-123, 195-197.

<sup>20</sup> The injunction to observe the Sabbath day in Deuteronomy 5:14 is that on that day ". . . thou shalt not do any work, thou, nor thy son, nor thy daughter, nor thy manservant, nor thy maidservant, nor thine ox, nor thine ass, nor any of thy cattle, nor thy stranger that is within thy gates; that thy manservant and thy maidservant may rest as well as thou." Among Christian explicators of the Old Testament a social inspiration was early ascribed to this language. See Milton, *A Treatise on Christian Doctrine*, book 2, c. 7, in *V Prose Works of John Milton* (Sumner trans. 1877) 67. Luther, in the *Large Catechism*, part I, Third Commandment, wrote: ". . . we keep holydays not for the sake of intelligent and learned Christians; for they have no need of it. We keep them, first, for the sake of bodily necessity. Nature teaches and demands that the mass of the people—servants and mechanics, who the whole week attend to their work and trades—retire for a day of rest and recreation." I Lenker, *Luther's Catechetical Writings* (1907), 60. See also Luther's *Treatise on Good Works* (1520), Third Commandment, XVII, in *I Works of Martin Luther* (1915), 241. Compare Calvin's *Institutes*: among the three reasons for Sabbath observance, the Lord "resolved to give a day of rest to servants and those who are under the authority of others, in order that they should have some respite from toil." Calvin, *Institutes of the Christian Religion* (Battles trans. 1960), book II, c. 8, § 28, at p. 395. And see *Early Writings of John Hooper*, D. D. (Carr ed. 1843) 337: "Then likewise God by this commandment provideth for the temporal and civil life of man, and likewise for all things that be necessary and expedient

were asserted in the eighteenth century on behalf of Sunday rest, in part, in the service of health and welfare.<sup>21</sup> Blackstone wrote that "... besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling

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for man in this life. If man, and beast that is man's servant, should without repose and rest always labour, they might never endure the travail of the earth. God therefore, as he that intendeth the conservation and wealth of man and the thing created to man's use, commandeth this rest and repose from labour, that his creatures may endure and serve as well their own necessary affairs and business, as preserve the youth and offspring of man and beast . . . ."

<sup>21</sup> In 1778 there appeared an essay by Vicesimus Knox, M. A., supporting state-enforced Sunday observance on grounds of health and custom as well as of religion. See Whitaker, *The Eighteenth-Century English Sunday* (1940), 148. It is reported that in 1728 the members of the Gloucester Company or Fraternity of Barbers had undertaken to enforce by fine a self-imposed prohibition of Sunday labor, apparently to assure that those who wanted a six-day work week would not be compelled by competition to labor on the whole seven. See *id.*, at 59-60.

them to the worship of their Maker."<sup>22</sup> In 1788 the schedule to the act, 28 Geo. III, c. 48, obligated master chimney sweeps to have their apprentices washed at least once a week, providing that on Sunday the master should send the apprentice to worship, should allow him to have religious instruction, and should not allow him to wear his sweeping dress; the act also regulated the sweeps' hours of work. In 1832 a Commons Select Committee on the Observance of the Sabbath heard the testimony of a medical doctor as to the physically injurious effects of seven-day unremitted labor,<sup>23</sup> and although the report of the Committee reveals a primarily religious cast of mind, it discloses also a sensitivity to the plight of the journeyman bakers, seven thousand of whom had petitioned the House for one day's repose weekly, and to the wishes of shopkeepers and tradesmen forced by competition to work on Sunday, although "most desirous of a day of rest."<sup>24</sup> The Committee recommended the enactment of severer sanctions for Lord's day violations: "The objects to be attained by Legislation may be considered to be, first, a solemn and decent outward Observance of the Lord's-day, as that portion of the week which is set apart by Divine Command for Public Worship; and next, the securing to every member of the Community without any exception, and however low his station, the uninterrupted enjoyment of that Day of Rest which has been in Mercy provided for him, and the privilege of employing it, as well in

<sup>22</sup> IV Blackstone Commentaries (Lewis ed. 1897) \* 63. Compare the Report of the Committee on the Judiciary [on] . . . the Petition . . . praying . . . "the repeal of all laws . . . enforcing the observation of a day of the week as the Sabbath . . .," Mass. Leg. Docs., II, Doc. No. 125 (1851), 9-10.

<sup>23</sup> Report from Select Committee on the Observance of the Sabbath Day, in 7 H. C., Sessional Papers (1831-1832), at pp. 116-117.

<sup>24</sup> *Id.* at p. 6. See *id.* at pp. 5-8.

the sacred Exercises for which it was ordained, as in the bodily relaxation which is necessary for his well-being, and which, though a secondary end, is nevertheless also of high importance.”<sup>25</sup>

But, whatever the nature of the propulsions underlying state-enforced Sunday labor stoppage during these centuries before the twentieth, it is clear that its effect was the creation of an institution of Sunday as a day apart. The origins of the institution were religious, certainly but through long-established usage it had become a part of the life of the English people.<sup>26</sup> It was a day of rest not merely in a physical, hygienic sense, but in the sense of a recurrent time in the cycle of human activity when the rhythms of existence changed, a day of particular associations which came to have their own autonomous value for life.<sup>27</sup> When that value was threatened by the pressures of the Industrial Revolution, agitation began for new

<sup>25</sup> *Id.*, at pp. 9-10.

<sup>26</sup> See Trevelyan's comment quoted in the foreword to Skottowe, *The Law Relating to Sunday* (1936); Whitaker, *Sunday in Tudor and Stuart Times* (1933); Whitaker, *The Eighteenth-Century English Sunday* (1940), especially at 192, 199-201.

<sup>27</sup> Addison, writing in No. 112 of the *Spectator*, July 9, 1711: "I am always very well pleased with a country Sunday, and think, if keeping holy the seventh day were only a human institution, it would be the best method that could have been thought of for polishing and civilizing of mankind. It is certain, the country people would soon degenerate into a kind of savages and barbarians, were there not such frequent returns of a stated time, in which the whole village meet together with their best faces, and in their cleanest habits, to converse with one another upon different subjects, hear their duties explained to them, and join together in adoration of the supreme Being. Sunday clears away the rust of the whole week, not only as it refreshes in their minds the notions of religion, but as it puts both the sexes upon appearing in their most agreeable forms, and exerting all such qualities as are apt to give them a figure in the eye of the village." *The Spectator* (Am. ed. 1859), at 160. See the attempt to capture the peculiar atmosphere of Sunday in the opening lines to the second book of Crabbe's *The Village* (1783):



legislative action to preserve the traditional English Sunday.<sup>28</sup>

At the turn of the century, the Factory and Workshop Act, 1901, prohibited the Sunday employment of women and children in industrial establishments.<sup>29</sup> The Shops Act, 1912, in its institution of a five-and-a-half-day week for shop assistants, built upon the base of existing Sunday closing law.<sup>30</sup> When during the war, the pressures of

<sup>28</sup> In 1895 the late president of a grocers' association testifying on a proposed bill regulating the closing hours of shops urged that the Commons Committee recommend Sunday closing to the House: the many English grocers who wanted their Sunday off were alarmed at the threat of increased trade by competitors which would force their own opening on Sunday. Report from the Select Committee on Shops (Early Closing) Bill (Commons 1895) 158-159. The Report from the Select Committee of the House of Lords on the Sunday Closing (Shops) Bill [H. L.] (1905), did recommend Sunday closing legislation, which it found supported by all but one of the more than three hundred shopkeepers associations whose views were ascertained. The Committee's Report, at VI-VII quotes the testimony of a witness (a clergyman, it may be noted), that "... the great need that impresses all of us busy workers in my part of London is the fact that because of the noise and rush we do want to safeguard the lives of our people by their having one day in seven: It is necessary for brain and for body; quite apart from the religious aspect of the question, for the moment, and by the stress at which we are all living down there Sunday has become practically like any other day. . . . The British population say that they would lose their custom in a great measure if they, in self-defence, did not open on Sunday. The feeling is very dominant that the result is that many of them have to work, whether they like it or not, seven days a week." (See also testimony to the same effect, *id.*, at 3-4, 17, 20, 30, 36, 40.)

<sup>29</sup> 1 Edw. VII, c. 22, § 34. Continued, as amended, in the Factories Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 67, § 77.

<sup>30</sup> 2 Geo. V, c. 3, §§ 4, 4, provides for a half-day closing and a half-day off for employees "On at least one week day in each week." (§ 1.) Other twentieth century legislation indicates recognition of the interweaving effects of the Sunday laws and other hours-of-labor legislation. The statute of 2 & 3 Eliz. II, c. 57, § 12, repealed the Sunday laws affecting the baking industry as part of a new program



national defense compelled continuous factory operation, a Committee of the Ministry of Munitions appointed to investigate industrial fatigue as this affected the health and efficiency of munitions workers, recommended to Parliament reinauguration of Sunday work stoppage:

" . . . The problem of Sunday labour, although materially affected by various industrial questions and the established custom of Sunday rest, is—as regards Munitions Works—primarily a question of the extent to which workers actually require weekly or periodic rests if they are to maintain their health and energy over long periods. Intervals of rest are needed to overcome mental as well as physical fatigue. In this connection account has to be taken not only of the hours of labour (overtime, 12-hour shifts, 8-hour shifts), the environment of the work and the physical strain involved, but also the mental fatigue or boredom resulting from continuous attention to work. As one Manager put it, it is the monotony of the work which kills—the men get sick of it.

" . . . [I]f the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed. . . . On economic and social grounds alike this weekly period of rest is best provided on Sunday . . . ."

of hours regulation for that industry. The Sunday Entertainments Act, 1932, 22 & 23 Geo. V, c. 51, permitting Sunday cinema as local option, subjects the allowance of Sunday operation to the condition that no person may be employed therein who has worked on each of the six days next preceding, except in emergencies, in which case the employee must get his day's rest subsequently.

<sup>31</sup> Ministry of Munitions, Health of Munition Workers Committee, Report on Sunday Labour, Memorandum No. 1 [Cmd. 8132] (1915), 3, 5. The Committee had not been directed specifically to investigate

In 1936 the conflict between the economic pressures for seven-day commercial activity and the resistance to those pressures culminated in the Shops (Sunday Trading Restriction) Act of that year, which, with a complex pattern of exceptions, prohibited Sunday trading upon pain of penalties more severe, and hence better calculated to assure obedience, than the nominal fines which had obtained under the seventeenth century Lord's day ban.<sup>32</sup> The Parliamentary Debates on the 1936 Act are instructive. With extremely rare exceptions,<sup>33</sup> no intimation of religious purpose is to be discovered in them.<sup>34</sup> The opening speech by Mr. Loftus who introduced the bill is representative:

"... [I]t is a Bill which is necessary to secure the family life and liberty of hundreds of thousands of our people;

the Sunday labor question, but in its inquiries generally into hours of labor it discovered that "employers and workers were specially concerned at the present time with the problem of Sunday labour," and the Committee was "so impressed with the urgency and importance of this question," that it determined to submit a preliminary report on this subject alone. *Id.* at 3.

<sup>32</sup> 26 Geo. V & 1 Edw. VIII, c. 53. See also the Retail Meat Dealers' Shops (Sunday Closing) Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 30. These acts are continued in the Shops Act, 1950, 14 Geo. VI, c. 28, part IV.

<sup>33</sup> See 308 H. C. Deb. 2216 and 2223 (5th ser. 1935-1936) (suggesting that persons ought not be made to work on a day when they would want to attend religious services), *id.* at 2214. The strongest Christian religious sentiment was demonstrated by an opponent of the bill, see 311, *id.* at 497. Other opposing speakers waved the shibboleth of religious motive in an attempt to discredit the measure. See 308, *id.* at 2190-2191; 311, *id.* at 2097; but see 308, *id.* at 2179-2182, 101 H. L. Deb. 262 (5th ser. 1935-1936) (two opponents admit absence of religious purpose or effect).

<sup>34</sup> This is especially significant in England where, of course, no constitutional compulsion exists to encourage Parliament to "make a record" concealing a clandestine sectarian aim.

" . . . I will explain to the House that there are thousands of shopkeepers who hate opening on Sunday—they dislike the whole idea—but are forced to open because their neighbours open. They are forced to open not for the sake of the Sunday trading, but because if they let their customers get into the habit on Sunday of going to other shops they may lose their week-day custom. . . . They have the right to a holiday on Sunday, to be able to rest from work on that day and to go out into the parks or into the country on a summer day. That is the liberty for which they are asking, and that is the liberty which this Bill would give to them. As regards the support behind the Bill, it is promoted by the Early Closing Association, with 300 affiliated associations, and the National Federation of Grocers, representing 400,000 individual shops, and is supported by the National Chamber of Trade, the Drapers' Chamber of Trade, the National Federation of the Boot Trade, and as regards the employes—and this is important—it is supported by the National Union of Shop Assistants and by the National Union of Distributive Workers." <sup>35</sup>

Speakers asserted the necessity for maintaining "the traditional quality of the Sunday in this country." <sup>36</sup> One particularly staunch Labour supporter of the measure argued:

" . . . Frankly, I am afraid of a seven-day week. I see it coming gradually, and a seven-day week

<sup>35</sup> 308 H. C. Deb. 2157-2159 (5th ser. 1935-1936). See also *id.* at 2165-2167, 2174, 2183, 2186, 2207, 2211, 2213, 2223-2224; 101 H. L. Deb. 254-255, 266 (5th ser. 1935-1936).

<sup>36</sup> 308 H. C. Deb. 2209 (5th ser. 1935-1936). See also 311, *id.* at 453-454, 490. Throughout the debates it is emphasized that the bill was "a Sunday Trading Restriction Bill and not . . . a Bill to have one day's rest in seven." 311, *id.* at 456; see *id.* at 2106. Yet it was not the sacred quality of the day that was meant.

means six days' pay for seven days' work. I have worked seven days a week in my time and I say that, if I can help it, nobody else shall work seven days for six days' pay. It is clear that if one shopkeeper opens in a street, the whole street is bound to open and, if one street opens, the whole town must open automatically. . . . I am not speaking as a Sabbatarian. I stand for the six-day working week with one day's rest in seven but I do not want that day's rest arranged on the lines suggested by the hon. Member . . . who, apparently, wants to turn my Sunday into a Tuesday or a Wednesday. The argument is that all we need do is to say there shall be a six-day working week with one day's rest in seven, and that it does not matter whether the Sunday comes on a Friday or a Tuesday. As a family man let me say that my family life would be unduly disturbed if any member had his Sunday on a Tuesday. The value of a Sunday is that everybody in the family is at home on the same day. What is the use of talking about a six-day working week in which six members of a family would each have his day of rest on a different day of the week?"

The bill was strongly supported by labor and trade groups<sup>38</sup> and passed by an overwhelming margin.<sup>39</sup>

Thus the English experience demonstrates the intimate relationship between civil Sunday regulation and the interest of a state in preserving to its people a recurrent time of mental and physical recuperation from the strains and pressures of their ordinary labors. It demonstrates also, of course, the intimate historical connection between the choice of Sunday as this time of rest and the doctrines

<sup>37</sup> 308, *id.*, at 2197-2198.

<sup>38</sup> See 308, *id.*, at 2186, 2194-2195, 2206; 311, *id.*, at 2095.

<sup>39</sup> Although a private member's bill, the measure passed on the second reading in Commons by a 191 to 8 vote. 308, *id.*, at 2230.

of the Christian church. Long before the emergence of modern notions of government, religion had set Sunday apart. Through generations, the people were accustomed to it as a day when ordinary uses ceased. If it might once—or elsewhere—have been equally practicable to fulfill the same need of the workers and traders for periodic relaxation by the selection of some other cycle, it was no longer practicable in England. Some hypothetical man might do better with one-day-in-eight, or one-day-in-four, but the Englishman was used to one-day-in-seven. And that day was Sunday. Through associations fostered by tradition, that day had a character of its own which became in itself a cultural asset of importance: a release from the daily grind, a preserve of mental peace, an opportunity for self-disposition. Certainly, legislative fiat could have attempted to switch the day to Tuesday. But Parliament, naturally enough, concluded that such an attempt might prove as futile as the ephemeral decade of the French Republic of 1792.<sup>40</sup>

<sup>40</sup> Even on the Continent the forces which in the latter half of the nineteenth century pressed for the amelioration of the working conditions of the laborer expressed themselves in part in Sunday legislation. Germany, Austria, the Swiss Federal Government, Denmark, Norway and Russia in the 1870's, 80's and 90's promulgated regulations prohibiting Sunday employment—in some cases only for women and children; in others, for all workers in enumerated industries—or closing factories or commercial establishments during part or all of the day. See *Congrès International du Repos-Hebdomadaire*, Paris, 1889, *Compte-Rendu* (1890), 339-344; *Congrès International du Repos du Dimanche*, Bruxelles, 1897, *Rapports et Compte Rendu* (1898), 9-24, 139-159, 229-234; *Congrès International du Repos du Dimanche*, Paris, 1900, *Rapports et Compte Rendu* (1900), *Rapports* No. I, II, VII; Mackenzie, ed., *The World's Rest-Day, An Account of the Thirteenth International Congress on the Lord's Day*, Edinburgh, 1908 (1909), 168-187; Report of the Joint Special Committee to Revise, Consolidate and Arrange the General Laws Relating to the Observance of the Lord's Day, Mass. Leg. Docs., H. Doc. No. 1160

## III.

In England's American settlements, too, civil Sunday regulation early became an institution of importance in shaping the colonial pattern of life. Every Colony had a law prohibiting Sunday labor. These had been enacted

(1907). Appendix, at 57-66. In the late 1880's a German plebiscite conducted by Bismarck showed strong popular support among both employers and employees for Sunday closing. See *Congrès International du Repos Hebdomadaire*, Paris, 1889, *Compte-Rendu* (1890), 360-364. The development of the European Sunday-closing movement is reflected in the proceedings of the various conventions of an institution which convened sometimes as the International Congress on Sunday rest, sometimes as the International Congress for weekly rest. See the reports cited, *supra*; see also, *e. g.*, Jackson, ed., *Sunday Rest in the Twentieth Century. An Account of the International Sunday Rest Congress at St. Louis, 1904* (1905); *Congresso Internazionale Pro Riposo Settimanale. Resoconto*, Milano, 1906 (undated); Sunday, *The World's Rest Day, Fourteenth International Lord's Day Congress*, Oakland, California, 1915 (1916). At the first meeting of this group in Geneva in 1876, the delegates displayed a primarily religious outlook, although much was also said of the physical and moral betterment of the worker through periodic rest. *Congrès sur l'observation du Dimanche*, Genève, 1876, *Actes* (1876), 120, 187-191, 353-367. A major objective of the Conference was to secure Sunday off for the railroad employees. When, after several intervening conventions, the International Congress met in Paris in 1889, it was under the presidency of Leon Say, and its temper was rather secular than clerical. It took the name of the *Congrès International du Repos Hebdomadaire*, and though it contained members both of conservative-religious and of socialist tendencies, the latter were more vocal and especially took the lead in formulating the Congress's program of state-enforced, rather than merely voluntary, industrial closing. See *Congrès International du Repos Hebdomadaire*, Paris 1889, *Compte-Rendu* (1890), 83-103, 103-108, 344-380. Yet the group resolved to demand not merely some one indeterminate day of rest weekly, but *Sunday*: "1. Sunday rest is possible to varying degrees in every industry. 2. This is the day of rest which is most suitable both to the employer and to the worker, as well from the point of view of

in many instances prior to the last quarter of the seventeenth century, and they were continued in force throughout the period that preceded the adoption of the Federal

the individual as from that of the family, and because it is good that the day of rest should be, as much as possible, the same for all." *Id.*, at 160 (translated from the French); see also *id.*, at 126, 167, 197. (Compare the Convention Concerning Weekly Rest in Commerce and Offices, 1957, Convention 106 of the General Conference of the International Labour Organization, Geneva, 1957, H. R. Doc. No. 432, 85th Cong., 2d Sess. 7-12, providing for a weekly day of rest which shall, where possible, "coincide with the day of the week established as a day of rest by the traditions or customs of the country or district." Art. 6, § 3. So far as possible, the traditions and customs of religious minorities are to be respected. Art. 6, § 4. Similarly, The International Labour Conference's Draft Convention Concerning the Application of the Weekly Rest in Industrial Undertakings, adopted at the Third Session of the General Conference in Geneva in 1921, establishes 24 consecutive hours of rest per seven days for industrial workers, to be fixed, wherever possible "so as to coincide with the days already established by the traditions or customs of the country or district." Art. 2. International Labour Conference, 3d Sess., Draft Conventions & Recommendations (1921), 30.)

At Chicago, four years later, both clerical and laborite perspectives were again represented; George E. McNeill, one of the pioneers of the American labor movement, spoke, and the representative of the Brotherhood of Railway Trainmen and other railroad worker's organizations, L. S. Coffin, supported Sunday rest. *The Sunday Problem, Its Present Day Aspects, Papers Presented at the International Congress on Sunday Rest, Chicago, 1893 (1894)*, 43, 95. In 1897, at Brussels, the spirit was again predominantly secular; the Congress debated extensively the question whether governmental action to compel a day of rest was advisable, or whether the matter could best be handled by persuasion of individual employers; and the sense of the meeting strongly favored governmental intervention. *Congrès International du Repos du Dimanche, Bruxelles 1897, Rapports et Compte Rendu (1898)*, 35-47, 161-171, 377-385, 387-393, 538-559. See also *Congrès International du Repos du Dimanche, Paris, 1900, Rapports et Compte Rendu (1900)*. Later meetings of the Congress tended to be religion-oriented, although secular interests continued to find voice. See Jackson, ed., *op. cit.*, *supra*, at 59-77, 85-96; Mackenzie, ed., *op. cit.*, *supra*, at 187.



Constitution and the Bill of Rights.<sup>41</sup> This is not in itself, of course, indicative of the purpose of those laws, or of their consistency with the guarantee of religious freedom which the First Amendment, restraining the power of the central Government, secured. Most of the States were only partly disestablished in 1789.<sup>42</sup> Only in Virginia,<sup>43</sup> and in Rhode Island, which had never had an establishment,<sup>44</sup> had the ideal of complete church-state separation been realized. Other States were fast approaching that ideal, however, and everywhere the spirit of liberty in religion was in the ascendant. Ratifying Conventions in New York, New Hampshire and North Carolina, as well as in Virginia and Rhode Island, proposed an anti-establishment amendment to the Constitution or signified that in their understanding the Constitution embodied such a safeguard.<sup>45</sup> All of these five States had Sunday laws at the time that their Conventions spoke. Indeed, in four of the five, their legislatures had reaffirmed the Sunday labor ban within five years or less immediately prior to that date.<sup>46</sup>

<sup>41</sup> See Appendix I to this opinion. Hereafter the colonial Sunday statutes will be cited by date and Colony.

<sup>42</sup> Cobb, *The Rise of Religious Liberty in America* (1902), 482-517; Sweet, *The Story of Religion in America* (rev. ed. 1939), 274-280.

<sup>43</sup> See James Madison's essay, "Monopolies, Perpetuities, Corporations, Ecclesiastical Endowments," in Fleet, *Madison's "Detached Memoranda,"* 3 *Wm. & Mary Q.* 534, 551, 554-556 (1946). See authorities cited in note 3, *supra*.

<sup>44</sup> See Proceedings of the First General Assembly of "The Incorporation of Providence Plantations," and the Code of Laws, 1647 (1847), 50: "... and, otherwise than thus what is herein forbidden, all men may walk as their consciences persuade them, every one in the name of his GOD ...." See Cobb, *The Rise of Religious Liberty in America* (1902), 423-440.

<sup>45</sup> See note 2, *supra*.

<sup>46</sup> New Hampshire enacted Sunday laws in 1785 and 1789, New York in 1788, Virginia in 1786. Rhode Island in 1784 exempted from

The earlier among the colonial Sunday statutes were unquestionably religious in purpose. Their preambles recite that profanation of the Lord's day "to the great Reproach of the Christian Religion,"<sup>47</sup> or "to the great offence of the Godly welafected among us,"<sup>48</sup> must be suppressed; that "the keeping holy the Lord's day, is a principal part of the true service of God";<sup>49</sup> that neglecting the Sabbath "pulls downe the judgments of God upon that place or people that suffer the same . . . ."<sup>50</sup> The first Pennsylvania Sunday law announces a purpose "That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience . . . ." <sup>51</sup> Sometimes

her Sunday labor ban members of Sabbatarian societies, but specified that the exemption did not extend to allow such persons to keep shops open or to do mechanical labor in compact places: in 1798 Rhode Island again enacted a comprehensive Sunday law with the same exceptions.

<sup>47</sup> Delaware, 1740.

<sup>48</sup> Massachusetts (Plymouth), 1658.

<sup>49</sup> Georgia, 1762. See also Maryland, 1696; New York, 1685; South Carolina, 1712. See the statute of 1 Charles I, quoted in text at note 12, *supra*. The law of the Massachusetts Bay Colony in 1653 recited that playing, walking, drinking, sporting, and traveling on the Lord's day tend "much to the Dishonour of God, the Reproach of Religion, Grieving the Souls of Gods Servants, and the Prophana-tion of his Holy Sabbath, the Sanctification whereof is sometimes put for all Duties, immediately respecting the service of God contained in the first Table . . . ."

<sup>50</sup> Connecticut, 1668.

<sup>51</sup> Pennsylvania, 1682; see also the statutes of 1690, 1700. The "Body of Laws" of 1682 declared religious tolerance for all persons believing in a Supreme Being: "But to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, *Be It further Enacted* . . . That, according to the example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's day, People shall abstain from their usual and common ~~toil~~ and labour, That whether Masters, Parents, Children, or Servants, they may the better

reproach of God is made an operative element of the offense.<sup>52</sup> Prohibitions of Sunday labor are frequently coupled with admonitions that all persons shall "carefully apply themselves to Duties of Religion and Piety, publicly and privately . . . <sup>53</sup> and are found in comprehensive ecclesiastical codes which also prohibit blasphemy,<sup>54</sup> lay taxes for the support of the church,<sup>55</sup> or compel attendance at divine services.<sup>56</sup>

dispose themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best suite their respective ~~persuasions~~ <sup>57</sup>

<sup>52</sup> The New Haven Code of 1656 provides: "Whosoever shall profane the Lord's Day, or any part of it, either by sinful servile work, or by unlawful sport, recreation or otherwise, whether wilfully, or in a careless neglect, shall be duly punished by fine, imprisonment, or corporally, according to the nature and measure of the sin, and offence." But if the court upon examination, by clear and satisfying evidence, find that the sin was proudly, presumptuously, and with a high hand committed against the known command and authority of the blessed God, such a person, therein despising and reproaching the Lord, shall be put to death, that all others may fear and shun such provoking Rebellious courses. Numb. 15: from 30 to 36 verse." The Plymouth Colony law of 1671 is similar. And see the act published in the Bay Colony in 1647, by which to "deny the moralitie of the fourth commandment" is branded among other heresies and made punishable by banishment. *Laws and Liberties of Massachusetts*, 1648 (reprinted 1929), 24.

<sup>53</sup> Massachusetts, 1692. See also New Hampshire, 1700; North Carolina, 1741. These statutes are patterned on 29 Charles II. c. 7, quoted in text at note 15, *supra*.

<sup>54</sup> Maryland, 1649; cf. Virginia, 1705 (atheism).

<sup>55</sup> Maryland, 1692, "An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province."

<sup>56</sup> See the Connecticut statute set forth in the Acts and Laws, 1750; Georgia, 1762; Massachusetts, 1761. Compulsory church-attendance laws in the New England Colonies dated from before the middle of the seventeenth century. See the Code of 1650 of the General Court of Connecticut (1822) 46; and the Bay Colony's act published in 1647, *Laws and Liberties of Massachusetts*, 1648 (reprinted 1929), 20.

But even the seventeenth century legislation does not show an exclusively religious preoccupation. The same Pennsylvania law which speaks of the suppression of atheism also ordains Sunday rest "for the ease of the Creation," and shows solicitude that servants, as well as their masters, may be free on that day to attend such spiritual pursuits as they may wish.<sup>57</sup> The Rhode Island Assembly in 1679 enacted:

"Voted, Whereas there hath complaint been made that sundry persons being evill minded, have pre-

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<sup>57</sup> See note 51, *supra*. This latter object, not the compulsion of conscience but the liberation of all individuals from Sunday labor and Sunday disturbance so that they might worship God as their own consciences dictated, was, at one period, not infrequently put forward as the justifying purpose of the Sunday laws. *State v. Ambs.*, 20 Mo. 214, 218 (1854); *George v. George*, 47 N. H. 27, 34 (1866); *Lindenmuller v. People*, 33 Barb. 548, 564 (N. Y. Sup. Ct., 1861); *Johnston v. Commonwealth*, 22 Pa. 102, 115 (1853). As the habits and preoccupations of the people themselves changed, it was but a short step from this reasoning to the recognition that Sunday laws serve the purpose of providing leisure and peace favorable to the pursuit of whatever aspirations, religious or secular, various individuals may choose. See text at note 35, *supra*. Sensitive to emerging new popular needs and desires, legislatures were later to reshape the Sunday laws by complex patterns of exceptions permitting numerous recreational activities which, far from according with the original puritanical inspiration of the Lord's day acts, were precisely those games and sports which colonial legislation most severely condemned. See, e. g., Virginia, 1610; Connecticut, 1668. The development of these evolving exceptions is discussed briefly in text at notes 124-131, *infra*; its product may be seen in Appendix II to this opinion. What it is significant to note at this point is that the continuity which marks the history of the Sunday laws is a continuity both of enduring and changing social demands. The enduring feature has been man's need for a day set apart, a day of community repose: this he has persistently, continually demanded. The changing feature has been the way in which he chooses to spend his day. The need which the "Body of Laws" recognized in Pennsylvania in 1682 was both the

sumed to employ in servile labor more than necessity requireth, their servants, and alsoe hire other mens servants and sell them to labor on the first day of the week: . . . bee it enacted . . . That if any person or persons shall employ his servants or hire and employ any other man's servant or servants, and set them to labor as aforesaid [he shall be penalized]." 58

same and different than that expressed by Luther, see note 20, *supra*, and that which twentieth century Sunday legislation accommodates. It is the need for a recurrent time when the common concern of the working week cease to make their demands, and there is a peace that is general to the community—whether the individual finds it at church, at home, at the beach, in the country, or at the baseball game.

<sup>58</sup> 3 Records of the Colony of Rhode Island and Providence Plantations, 1678-1706 (1858), 30-31. The first Rhode Island Sunday law was an enactment of 1673 prohibiting the dispensing of alcoholic beverages on Sunday. Its preamble is this:

"Voted, this Assembly considering that the King hath granted us that not any in this Collony are to be molested in the liberty of their consciences, who are not disturbers of the civill peace, and wee are perswaded that a most flourishing civil government with loyalty may be best propagated where liberty of conscience by any corporall power is not obstructed that is not to any unchastness of body, and not by a body doeing any hurt to a body, neither indeavoring soe to doe; and although wee know by man not any can be forced to worship God or for to keep holy or not to keep holy any day; but forasmuch as the first dayes of weeks, it is usuall for parents and masters not to employ their children or servants as upon other dayes, and some others alsoe that are not under such government, accountinge it as a spare time, and soe spend it in debaistnes or tipplinge and unlawfull games and wantonness, and most abheminably there practiced by those that live with the English at such times to resort to townes. Therefore, this Assembly, not to oppose or propagate any worship; but as by preventinge debaistnes, although wee know masters or parents cannot and are not by violence, to indeavor to force any under their government, to any worshipper from any worshipping, that is not debaistnes or disturbant to the civill peace, but they are to require

In the latter half of the eighteenth century, the Sunday laws, while still giving evidence of concern for the "immorality" of the practices they prohibit, tend no longer to be prefixed by preambles in the form of theological treatises.<sup>59</sup> Now it appears to be the community, rather than the Deity, which is offended by Sunday labor. New York's statute of 1788 no longer refers to the Lord's day, but to "the first day of the week commonly called Sunday."<sup>60</sup> Where preambles do appear, they display a duplicity of purpose. The Massachusetts Act of 1792 begins:

"Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labour and the cares of business; for moral reflections and conversation on the duties of life . . . ; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing

them, and if that will not prevaile, if they can they should compell them not to doe what is debaistnes, or uncivill or inhuman, not to frequent any imodest company or practices."

<sup>59</sup> See New Jersey, 1798; Delaware, 1795 (this statute does recite that its purpose is to deter those who "profane" the Lord's day); New Hampshire, 1785 and 1789 (these acts were, however, recommended to be read by ministers to their congregations). It is true that the Pennsylvania statute of 1794 is an act for the prevention of immorality and that the New Jersey statute of 1790 is "An Act to promote the Interest of Religion and Morality, and for suppressing of Vice . . .," but even these enactments show a very different tenor than that of earlier legislation in the same Colonies. See, e. g., Pennsylvania, 1682; New Jersey, 1693.

<sup>60</sup> Compare New York's legislation of 1685, 1695.

their worldly business and recreations on that day, to their own great damage, as members of a Christian society; to the great disturbance of well-disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life . . . ."

An enactment of Vermont in 1797 is similar.<sup>61</sup>

More significant is the history of Sunday legislation in Virginia. Even before the English statute of 29 Charles II, that Colony had had laws compelling Sunday attendance at worship<sup>62</sup> and forbidding Sunday labor.<sup>63</sup> In 1776, the General Convention at Williamsburg adopted a Declaration of Rights, providing, *inter alia*, that "... all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ."<sup>64</sup> and in the same year the acts of Parliament compelling church attendance and punishing deviation in belief were declared void, dissenters were exempted from the tax for support of the established church, and the levy of that tax was suspended.<sup>65</sup> Eight years later came the battle over the Assessment Bill. Under Madison's leadership the forces supporting entire freedom of religion wrote the definitive quietus to the Virginia establishment, and

<sup>61</sup> An Act, to enforce the due observation of the Sabbath; 1 Laws of Vermont (1808) 275.

<sup>62</sup> The earliest law was that of 1610. For the Colony in Virginia, Britannia, Lawes Divine, Morall and Martiall (1612), in 3. Force, Tracts Relating to the Colonies in North America (1844), II, 10-17. This was followed by an act of 1623-1624. 1 Hening, Statutes of Virginia (1823), 123. And see *id.* at 144.

<sup>63</sup> See Appendix I to this opinion. The most important statutes are those of 1629 and 1705, 1 Hening, Statutes of Virginia (1823), 14; 3 Hening, Statutes of Virginia (1823), 358.

<sup>64</sup> 9 Hening, Statutes of Virginia (1821), 109, 111-112.

<sup>65</sup> *Id.*, at 164.



Jefferson's Bill for Establishing Religious Freedom was enacted in 1786:

"I. Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to . . . propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; . . . that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, . . . that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, . . .

"II. *Be it enacted* . . . That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to main-

tain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." <sup>66</sup>

In this bill breathed the full amplitude of the spirit which inspired the First Amendment, and this Court has looked to the bill, and to the Virginia history which surrounded its enactment, as a gloss on the signification of the Amendment. See the opinions in *Everson v. Board of Education*, 330 U. S. 1. The bill was drafted for the Virginia Legislature as No. 82 of the Revised Statutes returned to the Assembly by Jefferson and Wythe on June 18, 1779.<sup>67</sup> Bill No. 84 of the Revision provided:

"If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings . . . ." <sup>68</sup>

<sup>66</sup> 12 Hening, Statutes of Virginia (1823), 84-86.

<sup>67</sup> 2 Papers of Thomas Jefferson (Boyd ed. 1950) 305-324, 545-553. For the story of the Revision, see Jefferson's Autobiography, in 1 Writings of Thomas Jefferson (Memorial ed. 1903) 62-67; I Randall, Life of Thomas Jefferson (1858), 202-203, 208, 216 *et seq.*

<sup>68</sup> 2 Papers of Thomas Jefferson (Boyd ed. 1950) 555. The bill was entitled: "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers." It also forbade the arrest for any civil cause of any minister of the gospel while engaged in public preaching or performing religious worship in any church, and punished any person who should maliciously disturb any worshipping congregation or misuse any minister therein. There is evidence to attribute the original draft of the provision to Jefferson, *id.*, at 314-321; in any event, we know that, with the other revisers, he studied and reworked every bill in the revision until it satisfied him. Autobiography, in 1 Writings of Thomas Jefferson (Memorial ed. 1903) 66.

This bill was presented to the Assembly by Madison in 1785,<sup>69</sup> and was enacted in 1786.<sup>70</sup> Apparently neither Thomas Jefferson nor James Madison regarded it as repugnant to religious freedom. Nor did the Virginia legislators who thirteen years later reaffirmed the Bill for Establishing Religious Freedom as "a true exposition of the principles of the bill of rights and constitution," by repealing all laws which they deemed inconsistent with it.<sup>71</sup> The Sunday law of 1786<sup>72</sup> was not among those repealed.

#### IV.

Legislation currently in force in forty-nine of the fifty States illegalizes on Sunday some form of conduct lawful if performed on weekdays.<sup>73</sup> In several States only one or a few activities are banned—the sale of alcoholic beverages,<sup>74</sup> hunting,<sup>75</sup> barbering,<sup>76</sup> pawnbroking,<sup>77</sup> trad-

<sup>69</sup> Journal of the House of Delegates, Commonwealth of Virginia, Oct. 17, 1785 (1828), 12-14.

<sup>70</sup> 12 Hening, Statutes of Virginia (1823), 336. The wording of the statute as passed differs slightly from that of the bill reported by the revisers.

<sup>71</sup> 2 Shepherd, Statutes of Virginia (1835), 149.

<sup>72</sup> Appendix II to this opinion. Only Alaska has no such legislation.

<sup>73</sup> See Delaware, Iowa, Wyoming. Many States which have broader Sunday statutes also provide special regulations for the sale of intoxicants on Sunday. Significantly, even those who have assailed the ban on Sunday labor as an unconstitutional religious establishment assert the constitutionality of Sunday alcohol control. See, e. g., Lewis, *A Critical History of Sunday Legislation* (1888), ix. They point to the contemporary justification for the prohibition of liquor sales on that day: the greater danger of abusive use of alcohol during a time when virtually all persons are at leisure. Admitting that there are also cogent contemporary reasons for a Sunday labor ban, they assert that the history of Sunday labor legislation reveals that these legitimate reasons are not those which in fact underlie it. But the roots of Sunday alcohol control are as deeply bedded in early

[Notes 74-76 are on p. 39.]

ing in automobiles—but thirty-four jurisdictions broadly ban Sunday labor, or the employment of labor, or selling or keeping open for sale, or some two or more of these comprehensive categories of affairs. In many of these States, and in others having no state-wide prohibition of industrial or commercial activity, municipal Sunday ordinances are ubiquitous.<sup>78</sup> Most of these regu-

Sabbath anti-tipping statutes as are those of Sunday labor laws in Lord's day acts. See the Connecticut statute set forth in the Acts and Laws, 1750; Delaware, 1740; Maryland, 1674; Massachusetts Bay, 1653; Massachusetts, 1761, New Hampshire, 1715; New York, 1685. See *State v. Eskridge*, 31 Tenn. 413 (1852). Indeed, the most severe efforts to enforce Sunday prohibitions in England were for centuries directed against tipping. See Whitaker, *The Eighteenth-Century English Sunday* (1940), passim; Whitaker, *Sunday in Tudor and Stuart Times* (1933), passim.

<sup>74</sup> See North Carolina. Many States with more comprehensive bans also specifically proscribe hunting. See, e. g., Connecticut, Kentucky, Mississippi, Tennessee, Virginia.

<sup>75</sup> See, e. g., Arizona, Colorado, Montana.

<sup>76</sup> Oregon. Cf. Michigan, New Jersey, Pennsylvania, Rhode Island.

<sup>77</sup> Colorado, Wisconsin. Cf., e. g., Connecticut, Maine, Michigan, Pennsylvania.

<sup>78</sup> Some States have specific legislation enabling municipalities to regulate Sunday business (e. g., Nebraska, North Dakota), or to suppress desecration of the Sabbath (e. g., Michigan, Mississippi, Rhode Island): Often such authority is written into a city's charter. See, e. g., *State v. McGee*, 237 N. C. 633, 75 S. E. 2d 783 (1953), app. dismissed for want of a substantial federal question, 346 U. S. 802. In some cases charter authority to regulate a given business or activity has been held to support Sunday regulation of that business or activity. See, e. g., *Hicks v. City of Dublin*, 56 Ga. App. 63, 191 S. E. 659 (1937). Where no other enabling provision is found, it is virtually unanimously held that power to enact Sunday ordinances exists under the general grant of police power to a municipality. E. g., *In re Sumida*, 177 Cal. 388, 170 P. 823 (1918); *Thiesen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894); *Karwisch v. Mayor of Atlanta*, 44 Ga. 204 (1871); *Humphrey Chevrolet, Inc. v. City of*

lations are the product of many re-enactments and amendments. Although some are still built upon the armatures of earlier statutes, they are all, like the laws of Maryland, Massachusetts and Pennsylvania which are before us in these cases,<sup>79</sup> recently reconsidered legislation. As expressions of state policy, they must be deemed as contemporary as their latest-enacted exceptions in favor of moving pictures<sup>80</sup> or severer bans of Sunday motor vehicle trading.<sup>81</sup> In all, they reflect a widely felt present-day need, for whose satisfaction old laws are shaped and new laws enacted.

To be sure, the Massachusetts statute now before the Court, and statutes in Pennsylvania and Maryland, still call Sunday the "Lord's day" or the "Sabbath." So do

*Evanston*, 7 Ill. 2d 402, 131 N. E. 2d 70 (1955); *Komen v. City of St. Louis*, 316 Mo. 9, 289 S. W. 838 (1926) (subsequently overruled on another point); *City of Elizabeth v. Windsor-Fifth Avenue, Inc.*, 31 N. J. Super. 187, 103 A. 2d 9 (1954); *Ex parte Johnson*, 20 Okla. Cr. 66, 201 P. 533 (1921); *Mayor of Nashville v. Linck*, 80 Tenn. 499 (1852); *City of Seattle v. Gervasi*, 144 Wash. 429, 258 P. 328 (1927); *State ex rel. Smith v. Wertz*, 91 W. Va. 622, 114 S. E. 242 (1922).

<sup>79</sup> There have been more than seventy amendments to the Massachusetts Sunday regulation over the past century. See the opinion below, 176 F. Supp. 466, 472, n. 2. The latest amendments prior to the bringing of suit in the *Gallagher* case were in 1957. Mass. Acts 1957, cc. 300, 356, §§ 16, 17, 18. By Mass. Acts 1960, c. 812, § 3, the provisions of chapter 136, Massachusetts' general Sunday regulations, were made applicable to all or part of certain legal holidays, e. g., January first, July fourth, Thanksgiving Day. The Pennsylvania statute which is considered here was enacted in 1959. Pa. Laws 1959, No. 212; and in the same year that State's Lord's day statute was three times amended. Pa. Laws 1959, Nos. 278, 540, 684. Maryland amended the provisions which are now its Code, Art. 27, §§ 492 to 534A, seven times in 1959. Maryland Laws 1959, cc. 232, 236, 248, 503, 510, 715, 811.

<sup>80</sup> *E. g.*, N. D. Laws 1959, c. 131; Tenn. Acts 1957, c. 219.

<sup>81</sup> *E. g.*, Fla. Laws 1959, c. 59-295; Me. Laws 1959, c. 302; Okla. Laws 1959, p. 210.

the Sunday laws in many other States.<sup>82</sup> But the continuation of seventeenth century language does not of itself prove the continuation of the purposes for which

<sup>82</sup> Maine, Minnesota, Mississippi, North Dakota, Oklahoma, West Virginia. Cf. Indiana, Missouri. But see Alabama, Illinois, New Mexico, Ohio.

Language can also be found in judicial opinions interpreting Sunday statutes which attributes religious purpose to them. See *O'Donnell v. Sweeney*, 5 Ala. 467, 469 (1843); *Weldon v. Colquitt*, 62 Ga. 449, 451-452 (1879); *Stôte v. Beaudette*, 122 Me. 44, 45, 118 A. 719, 720 (1922); *Pearce v. Atwood*, 13 Mass. 324, 346-348 (1816); *Bennett v. Brooks*, 91 Mass. 118, 119-121 (1864); *Davis v. City of Somerville*, 128 Mass. 594, 596 (1880); *Commonwealth v. White*, 190 Mass. 578, 580-582, 77 N. E. 636, 637 (1906); *Commonwealth v. McCarthy*, 244 Mass. 484, 486, 138 N. E. 835, 836-837 (1923); *Allen v. Duffie*, 43 Mich. 1, 7-9, 4 N. W. 427, 431-433 (1880); *Brin. al v. Van Campen*, 3 Minn. 13, 22 (1862); *Kountz v. Price*, 40 Miss. 341, 348 (1866); *People v. Ruggles*, 8 Johns. 290, 296-297 (N. Y. Sup. Ct. 1811); *Sellers v. Dugan*, 18 Ohio 489, 490, 492 (1849); *Commonwealth v. American Baseball Club*, 290 Pa. 136, 143, 138 A. 497, 499 (1927); *Commonwealth v. Coleman*, 60 Pa. Super. 380, 385-386 (1915); *Parker v. State*, 84 Tenn. 476, 477-479, 1 S. W. 202, 202-203 (1886); *Graham v. State*, 134 Tenn. 285, 292, 183 S. W. 983, 985 (1915). And see *Smith v. Boston & Maine R. Co.*, 120 Mass. 490, 493 (1876); *Society for the Visitation of the Sick v. Commonwealth*, 52 Pa. 125, 135 (1866). Even some decisions sustaining the constitutionality of the statutes have found their justification, in part, in the preservation of Christian traditions. *Shover v. State*, 10 Ark. 259 (1850); *State v. Ambs.*, 20 Mo. 214 (1854); *State ex rel. Temple v. Barnes*, 22 N. D. 18, 132 N. W. 215 (1911); *City Council v. Benjamin*, 2 Strob. L. 308 (S. C. 1848). Cf. *Varney v. French*, 19 N. H. 233 (1848); *Adams v. Gay*, 19 Vt. 358, 366 (1847). But most of these latter decisions date from an era when day-of-rest conceptions were not yet fully developed: the then prevailing notions of the police power did not accord to state legislatures authority to protect a man from the harm to himself of uninterrupted labor. Compare *Thomasson v. State*, 15 Ind. 449, 454 (1860) (speaking of the "patriarchal theory of government") with, e. g., *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278 (1915) (sustaining New York's six-day week statute by analogy to the Sunday law cases). The large majority of decisions applying the Sunday laws in cases where their constitutionality as



the colonial governments enacted these laws, or that these are the purposes for which their successors of the twentieth have retained them and modified them. We know:

possible infringements of religious liberty was not in issue have regarded the laws as having either an exclusively secular function, or a function accommodating both the civil and religious needs of the community. As to the former, see, e. g., *State v. Shuster*, 145 Conn. 554, 145 A. 2d 196 (1958); *Rogers v. State*, 60 Ga. App. 722, 4 S. E. 2d 918 (1939); *Carr v. State*, 175 Ind. 241, 93 N. E. 1071 (1911); *Tinder v. Clarke Auto Co.*, 238 Ind. 302, 149 N. E. 2d 808 (1958); *City of Harlan v. Scott*, 290 Ky. 585, 162 S. W. 2d 8 (1942); *Levering v. Park Commissioners*, 134 Md. 48, 106 A. 176 (1919); *State ex rel. Hoffman v. Justus*, 91 Minn. 447, 98 N. W. 325 (1904); *City of St. Louis v. DeLassus*, 205 Mo. 578, 104 S. W. 12 (1907) (subsequently overruled on another point); *State v. Chicago, Burlington & Quincy R. Co.*, 239 Mo. 196, 143 S. W. 785 (1912); *State v. Malone*, 238 Mo. App. 939, 192 S. W. 2d 68 (1946); *More v. Clymer*, 12 Mo. App. 11 (1882); *Auto-Rite Supply Co. v. Mayor of Woodbridge*, 25 N. J. 188, 135 A. 2d 515 (1957); *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 49 (1904); *State v. Ricketts*, 74 N. C. 187 (1876); *Bloom v. Richards*, 2 Ohio St. 387 (1853); *McGatrick v. Wason*, 4 Ohio St. 566 (1855); *Kreiger v. State*, 12 Okla. Cr. 566, 160 P. 36 (1916); *State v. Smith*, 19 Okla. Cr. 184, 198 P. 879 (1921); *State v. James*, 81 S. C. 197, 62 S. E. 214 (1908); *Francisco v. Commonwealth*, 180 Va. 371, 23 S. E. 2d 234 (1942); *State v. Baltimore & Ohio R. Co.*, 15 W. Va. 362 (1879); *State ex rel. Smith v. Wertz*, 91 W. Va. 622, 114 S. E. 242 (1922); and see *Stark v. Backus*, 140 Wis. 557, 123 N. W. 98 (1909). As to the latter, see *Rosenbaum v. State*, 131 Ark. 251, 199 S. W. 388 (1917); *State v. Hurliman*, 143 Conn. 502, 123 A. 2d 767 (1956); *Richmond v. Moore*, 107 Ill. 429 (1883); *State v. Mead*, 230 Iowa 1217, 300 N. W. 523 (1941); *Cleveland v. City of Bangor*, 87 Me. 259, 32 A. 892 (1895); *Matter of Rupp*, 33 App. Div. 468, 53 N. Y. S. 927 (1898); *People v. Moses*, 140 N. Y. 214, 35 N. E. 499 (1893); *Moore v. Owen*, 58 Misc. 332, 109 N. Y. S. 585 (N. Y. Sup. Ct. 1908); *Melvin v. Easley*, 52 N. C. 356 (1860); *Johnston v. Commonwealth*, 22 Pa. 102 (1853). Cf. the cases finding foundation for the laws in long-established usage: *Commonwealth v. Louisville & Nashville R. Co.*, 80 Ky. 291 (1882); *Mohney v. Cook*, 26 Pa. 342 (1855); *Commonwealth v. Nesbit*, 34 Pa. 398 (1859); *Commonwealth v. Jeandelle*, 3 Phila., 509 (Pa. Q. S. 1859). And see *People v. Law*, 142 N. Y. S. 2d 440 (Spec. Sess. 1955); *People v. Binstock*, 7 Misc. 2d 1039, 170 N. Y. S. 2d 133 (Spec. Sess. 1957).



for example, that Committees of the New York Legislature, considering that State's Sabbath Laws on two occasions more than a century apart, twice recommended no repeal of those laws, both times on the ground that the laws did not involve "any partisan religious issue, but rather economic and health regulation of the activities of the people on a universal day of rest,"<sup>53</sup> and that a Massachusetts legislative committee rested on the same views.<sup>54</sup> Sunday legislation has been supported not only

<sup>53</sup>State of New York, Second Report of the Joint Legislative Committee on Sabbath Law, N. Y. Leg. Doc. No. 48 (1953), 9. See Report Of the committee on the judiciary, on the petition . . . praying the repeal of the laws for the observance of the sabbath, &c., 5 State of New York, Assembly Docs., Doc. No. 262 (1838). This latter report, denying any intention to enforce the duties of religious conscience, *id.*, at 7, regarded retention of the Sunday law as advisable, "Viewing the sabbath merely as a civil institution, venerable from its age, consecrated as a day of rest by the usage of our fathers, and cherished by the common consent of mankind throughout the nations of christendom . . ." *Id.*, at 5. "The experience of mankind has shewn that occasional rest is necessary for the health of the laborer and for his continued ability to toil; that the interval of relaxation which Sunday affords to the laborious part of mankind, contributes greatly to the comfort and satisfaction of their lives, both as it refreshes them for the time, and as it relieves their six days' labor by the prospect of a day of rest always approaching . . ." *Id.*, at 7. The Committee did regard as a third consideration of importance the necessity of taking account of the moral temper of the Christian majority of the community; and of affording the laborer an opportunity to attend church if he so wished. *Id.*, at 6-8.

<sup>54</sup>"The committee are of one mind as to the need of a weekly day of rest for the preservation of the health and strength of the community, and would therefor [*sic*] recommend legislation to secure to all citizens the right of one clear day's rest in seven. In so far as possible, Sunday should be maintained as the weekly day of rest; and whenever the needs of the community, public convenience or demand compel labor on Sunday, persons thus employed should be given a legal right to rest on some other day of the week." Report of the Joint Special Committee to Revise, Consolidate and Arrange the General Laws . . . Relating to the Observance of the Lord's Day,

by such clerical organizations as the Lord's Day Alliance, but also by labor and trade groups.<sup>85</sup> The interlocking sections of the Massachusetts Labor Code construct their six-day week provisions upon the basic premise of Sunday

Mass. Leg. Docs., H. Doc. No. 1160 (1907), 9. For a similar, more recent expression, see Report Submitted by the Legislative Research Council Relative to Legal Holidays and Their Observance, Mass. Leg. Docs., S. Doc. No. 525 (1960), 24-25.

In the legislative debates on the bill which became the 1959 Pennsylvania Sunday retail sales act, the charge of religious purpose was persistently made by the bill's opponents, but such a purpose was disavowed by every speaker who favored the bill. 36 Pennsylvania Legislative Journal, 143d General Assembly (1959), 1137-1140, 2564-2565, 2682-2685. See, e. g., the remarks of Mr. Walker, *id.*, at 1139: "As I read this bill, I find nothing in it which is of a religious nature. The bill is prompted by the thousands of letters that we have all received in the Senate of Pennsylvania asking us to do something for the men and women who work in the department stores. These people are not asking to go to church; they are asking for a day of rest." It is apparent even from the objections raised by the opponents that various economic interests, among them those of organized retailers' and labor groups, were influential in supporting the measure. See especially *id.* at 2682-2683.

<sup>85</sup> Jacoby, *Remember the Sabbath Day?—The Nature and Causes of the Changes in Sunday Observance Since 1800* (Dissertation in Sociology, Microfilm, University of Pennsylvania Library (1942)), pp. 137-140, 147-148, 154-155, 200-202, c. 9; Kirstein, *Stores and Unions* (1950), 19-21; State of New York, *Second Report of the Joint Legislative Committee on Sabbath Law*, N. Y. Leg. Doc. No. 48 (1953), 16 *et seq.*; Report of the Unpaid Special Commission to Investigate . . . the Laws Relating to the Observance of the Lord's Day, Mass. Leg. Docs., H. Doc. No. 2413 (1954), 6; 36 Pennsylvania Legislative Journal, 143d General Assembly (1959), 1139, 2553. See the Sunday Business resolution of the 1959 and 1960 Conventions of the National Retail Merchants Association, 41 Stores 6-7 (Feb. 1959); 42 Stores 13 (Feb. 1960); and see note 40 *supra*. Frequently legislation closing establishments of a given trade is the product of lobbying efforts by associations of traders seeking to quash the competitive pressures which force unwanted Sunday labor. See *Gundaker Central Motors, Inc., v. Gassert*, 23 N. J. 71, 127 A. 2d 566

rest.<sup>86</sup> Other States have similar laws.<sup>87</sup> When in Pennsylvania motion pictures were excepted from the Lord's day statute, a day-of-rest-in-seven clause for motion picture personnel was written into the exempting statute to

(1936), app. dism'd for want of a substantial federal question, 354 U. S. 933; *Breyer v. State*, 102 Tenn. 103, 50 S. W. 769 (1889). But see Sunday Observance, Hearings before the Subcommittee on Judiciary of the Committee on the District of Columbia, House of Representatives, on H. R. 7189 and H. R. 10311, 69th Cong., 1st Sess. (1926) (labor and trade groups oppose Sunday legislation supported primarily by clerical faction). Increasingly, the religious proponents of Sunday legislation have themselves come to couch their arguments in terms of hygienic and social, rather than transcendental, values. See Gilfillan, *The Sabbath Viewed in the Light of Reason, Revelation, and History* (Am. ed. 1862), 209-227; Floody, *Scientific Basis of Sabbath and Sunday* (2d ed. 1906), 311-315; McMillan, *Influence of the Weekly Rest-Day on Human Welfare* (1927).

<sup>86</sup> Mass. Gen. Laws Ann., 1958, c. 149, §§ 47 to 51. Section 47 provides:

"Whoever, except at the request of the employee, requires an employee engaged in any commercial occupation or in the work of any industrial process not subject to the following section or in the work of transportation or communication to do on Sunday the usual work of his occupation, unless he is allowed during the six days next ensuing twenty-four consecutive hours without labor, shall be punished by a fine of not more than fifty dollars; but this and the following section shall not be construed as allowing any work on Sunday not otherwise authorized by law."

Section 48 provides:

"Every employer of labor engaged in carrying on any manufacturing, mechanical or mercantile establishment or workshop . . . shall allow every person . . . [with exceptions: see §§ 49, 50] employed in such manufacturing, mechanical or mercantile establishment or workshop at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days. No employer shall operate any such manufacturing, mechanical or mercantile establishment or workshop on Sunday unless he has complied with section fifty-one."

[Note 86 is continued on, and note 87 is on, p. 46.]

fill the gap.<sup>87</sup> Puerto Rico's closing law, which limits the weekday hours of commercial establishments as well as proscribing their Sunday operation, does not express a religious purpose.<sup>89</sup> Rhode Island and South Carolina now enforce portions of their Sunday employment bans through their respective Departments of Labor.<sup>90</sup> It cannot be fairly denied that the institution of Sunday as a time whose occupations and atmosphere differ from those of other days of the week has now been a portion of the American cultural scene since well before the Constitution; that for many millions of people life has a hebdomadal rhythm in which this day, with all its

Section 51 is:

"Before operating on Sunday every employer subject to section forty-eight . . . shall post in a conspicuous place on the premises a schedule containing a list of his employees who are required or allowed to work on Sunday, and designating the day of rest for each. No employee shall be required or allowed to work on the day of rest designated for him."

Note the evolution of these sections through Mass. Acts 1907, c. 577; codified in the Labor Code of 1909, Mass. Acts 1909, c. 514, § 52; Mass. Acts 1913, c. 619.

<sup>87</sup> See Ill. Rev. Stat., 1959, c. 48, §§ 8a to 8g; N. H. Rev. Stat. Ann., 1955, §§ 275.32, 275.33; N. Y. Lab. Law § 161; Ore. Wage and Hour Comm'n Orders Nos. 8 (1959), 9 (1952), 12 (1953), CCH Lab. Law Rep., State Laws (1960), pp. 57,561, 57,562, 57,564. Cf. West's Wis. Stat. Ann., 1957, § 103.85. And see Purdon's Pa. Stat. Ann., 1952, Tit. 43, § 361.

<sup>88</sup> Purdon's Pa. Stat. Ann., 1960 Supp., Tit. 4, § 60. See also Me. Rev. Stat., 1954, c. 134, § 41; Sunday Entertainments Act, 1932, 22 & 23 Geo. V, c. 51, § 1 (1)(a). Cf. P. R. Laws Ann., 1955, Tit. 29, § 295.

<sup>89</sup> P. R. Laws Ann., 1955, Tit. 33, § 2201. Cf. Colo. Rev. Stat. Ann., 1953, § 27-1-4; R. I. Gen. Laws, 1956, § 5-16-5.

<sup>90</sup> R. I. Gen. Laws, 1956, §§ 25-1-6, 25-1-8; S. C. Code, 1952, c. 64, § 5. See also *Mullis v. Celanese Corp.*, 234 S. C. 380, 108 S. E. 2d 547 (1959).

particular associations, is the recurrent note of repose.<sup>91</sup> Cultural history establishes not a few practices and prohibitions religious in origin which are retained as secular institutions and ways long after their religious sanctions and justifications are gone.<sup>92</sup> In light of these considera-

<sup>91</sup> See Mead, *The Pattern of Leisure in Contemporary American Culture*, 313 *Annals of The American Academy of Political and Social Science* 11-12 (Sept. 1957).

<sup>92</sup> Among the many examples that might be found in Frazer's *Golden Bough*, see his discussions of incest and murder, *The Golden Bough* (3d ed., Am. reprint 1951), II *The Magic Art* 107-117; *Taboo and the Perils of the Soul* 218-219. For other classic instances in various fields, see Weston, *From Ritual to Romance* (Anchor ed. 1957), *passim*; especially 81-100; Gilbert Murray, "Excursus on the Ritual Forms Preserved in Greek Tragedy," in Harrison, *Themis* (1912), 341 *et seq.*; Kluckhohn and Leighton, *The Navaho* (1946), 162-163; Tawney, *Religion and The Rise of Capitalism* (3d Mentor ed. 1950), *passim*.

See *Weekly Rest in Commerce and Offices, Report A, International Labour Conference, 26th Sess., Geneva, 1940* (1939), 2: "Sunday rest laws, from the Fourth Commandment downwards, have always been social as well as religious in intention, seeking to provide a periodic rest from daily toil as well as an opportunity for religious observance." Among the weekly-rest legislation of the many nations surveyed by the International Labor Organization's pertinent reports, the system most common is to provide for a uniform rest day, usually on Sunday. See, *id.*, *passim*, especially at 71-74; *Weekly Rest in Commerce and Offices, Report VII (1), International Labour Conference, 39th Sess., Geneva, 1956* (1955), *passim*, especially at 18, 24-26. "This tendency to ensure that the weekly rest is taken at the same time by all workers on the day established by tradition or custom has an obvious social purpose, namely to enable the workers to take part in the life of the community and in the special forms of recreation which are available on certain days." *Id.*, at 24. Commenting on the world-wide practice of weekly rest, the ILO reporters observe: "Quite often the practice originated as a religious observance and developed into a tradition which has persisted despite the disappearance of the original reasons or the decline in the part played by religious institutions in the social structure. At a very early stage this religious observance was backed by civil

tions, can it reasonably be said that no substantial non-ecclesiastical purpose relevant to a well-ordered social life exists for Sunday restrictions?

It is urged, however, that if a day of rest were the legislative purpose, statutes to secure it would take some other form than the prohibition of activity on Sunday.<sup>93</sup> Such

law and even today traces of this can often be found in constitutions and civil codes, in municipal by-laws and in the regulations of many countries concerning opening and closing hours of commercial and other establishments. Labour legislation has endeavoured to maintain and extend this practice in the light of the economic needs of modern society. . . . *Id.*, at 3.

<sup>93</sup> The District Court in the *Gallagher* case believed that the Massachusetts Lord's day statute could not reasonably be regarded as a day-of-rest provision, first, because its extensive exceptions allowed many persons to labor seven days a week and, second, because Massachusetts has other statutes providing for twenty-four consecutive hours of rest every seven days. Mass. Gen. Laws Ann., 1958, c. 149, §§ 47 to 51. These latter provisions, however, by their express terms, supplement, do not supplant, the Sunday prohibitions. The two objections to some extent answer each other: the existence of the six-day law is justified by, and in part provides for, the deficiencies of the Lord's day statute as day-of-rest legislation. But, in any event, the Lord's day statute is not merely day-of-rest legislation. It is common-day-of-rest legislation. To certain persons who, for reasons deemed compelling by the Massachusetts Legislature, cannot share in this common day—simply because not all activity can cease, even on Sunday—the Labor Code at least assures a day of physical rest. Compare the conclusions found in *Weekly Rest in Commerce and Offices*, Report VII (1), International Labour Conference, 39th Sess., Geneva, 1956 (1955), 52. It may be noted that a large majority of the thirty-four States having comprehensive Sunday restrictions also have some six-day week provisions in their labor or child-labor codes or regulations. See Appendix II to this opinion.

The District Court, in concluding that the Massachusetts Lord's day statute is religious legislation, took account of its origins in colonial laws, of its language and the language of the Massachusetts courts in cases applying it, of the statutory exceptions permitting certain recreational activity only in the afternoon hours and, in some cases, at a designated distance from places of worship, and of state-



statutes, it is argued, would provide for one day's labor stoppage in seven, leaving the choice of the day to the individual; or, alternatively, would fix a common day of rest on some other day—Monday or Tuesday. But, in all fairness, certainly, it would be impossible to call unreasonable a legislative finding that these suggested alternatives were unsatisfactory. A provision for one day's closing per week, at the option of every particular enterpriser, might be disruptive of families whose members are employed by different enterprises.<sup>25</sup> Enforcement might be more difficult, both because violation would be less easily discovered and because such a law would not be seconded, as is Sunday legislation, by the community's moral

ments in an *amicus* brief indicating that *amici* had an interest in preventing the secularization of Sunday. The implications of history and of the statutory language have already been discussed herein. The opinions in the Massachusetts cases adverted to by the court below, the latest decided in 1923, are insufficient to establish that the Massachusetts legislation as applied in 1960 to prohibit the Sunday operation of supermarkets lacks substantial secular purposes and effects. See note 101, *infra*. The validity of applications of the statute possibly affected by the afternoon-hour exceptions is not now presented; suffice to say that these exceptions do not render the legislation unconstitutional in its entirety or in the circumstances of this litigation. And the purposes, views and intentions of *amici*, of course, cannot be attributed to the legislature of the State of Massachusetts.

<sup>25</sup> See text at note 37, *supra*. Cf. Report of the Unpaid Special Commission to Investigate . . . the Laws Relating to the Observance of the Lord's Day, Mass. Leg. Does., H. Doc. No. 2413 (1954), 9: "The wave of materialism which is sweeping the country makes it most important that one day be set aside for worship, rest and to give all persons an opportunity to strengthen the bulwark of our American civilization—the home." Compare Report on the Weekly Rest-Day in Industrial and Commercial Employment, Report VII, International Labour Conference, 3d Sess., Geneva, 1921 (1921), 127: "Social custom requires that the same rest-day should as far as possible be accorded to the members of the same working family and to the working class community as a whole."



temper. More important, one-day-a-week laws do not accomplish all that is accomplished by Sunday laws. They provide only a periodic physical rest, not that atmosphere of entire community repose which Sunday has traditionally brought and which, a legislature might reasonably believe, is necessary to the welfare of those who for many generations have been accustomed to its recuperative effects.

The same considerations might also be deemed to justify the choice of Sunday as the single common day when labor ceases. For to many who do not regard it sacramentally, Sunday is nevertheless a day of special, long-established associations, whose particular temper makes it a haven that no other day could provide. The will of a majority of the community, reflected in the legislative process during scores of years, presumably prefers to take its leisure on Sunday.<sup>95</sup> The spirit of any people expresses in goodly measure the heritage which links it to its past. Disruption of this heritage by a regulation which, like the unnatural labors of Claudius's shipwrights, does not divide the Sunday from the week, might prove a measure ill-designed to secure the desirable community repose for which Sunday legislation is designed. At all events, Maryland, Massachusetts and Pennsylvania, like thirty-one other States with similar regulations, could reasonably so find. Certainly, from failure to make a substitution for Sunday in securing a socially desirable day of surcease from subjection to labor and routine a purpose cannot be derived to establish or promote religion.

The question before the Court in these cases is not a new one. During a hundred and fifty years Sunday laws have been attacked in state and federal courts as disregarding constitutionally demanded Church-State separa-

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<sup>95</sup> See note 92, *supra*. See also the resolution of the International Congress for weekly rest, 1889, quoted in note 40, *supra*.

tion, or infringing protected religious freedoms, or on the ground that they subserved no end within the legitimate compass of legislative power. One California court in 1858 held California's Sunday statute unconstitutional.<sup>96</sup> That decision was overruled three years later.<sup>97</sup> Every other appellate court that has considered the question has found the statutes supportable as civil regulations<sup>98</sup> and

<sup>96</sup> *Ex parte Newman*, 9 Cal. 502. Justice Field's dissent in this case has become a leading pronouncement on the constitutionality of Sunday laws.

<sup>97</sup> *Ex parte Andrews*, 18 Cal. 678. The controlling California constitutional guarantee of religious freedom comports only an analogue to the First Amendment's "free exercise," not an analogue to the "establishment" clause.

<sup>98</sup> *E. g.*, *Petit v. Minnesota*, 177 U. S. 164. Cf. *Hennington v. Georgia*, 163 U. S. 299; *Soon Hing v. Crowley*, 113 U. S. 703, 710. *In re Sumida*, 177 Cal. 388, 170 P. 823 (1918); *McClelland v. City of Denver*, 36 Colo. 486, 86 P. 126 (1906) (barbering prohibited); *Rosenbaum v. City & County of Denver*, 102 Colo. 530, 81 P. 2d 760 (1938) (automobile sales prohibited); *Mosko v. Dunbar*, 135 Colo. 172, 309 P. 2d 581 (1957) (automobile sales prohibited); *Walsh v. State*, 33 Del. [3 W. W. Harr.] 514, 139 A. 257 (1927), *semble*; *Gillooley v. Vaughan*, 92 Fla. 943, 956, 110 So. 653, 657 (1926) (cabarets and cinema prohibited); *State v. Dolan*, 13 Idaho 693, 92 P. 995 (1907); *State v. Cranston*, 59 Idaho 561, 85 P. 2d 682 (1938); *McPherson v. Village of Chebanse*, 114 Ill. 46, 28 N. E. 454 (1885) (ordinance held authorized by police power); *Voglesong v. State*, 9 Ind. 112 (1857); *Foltz v. State*, 33 Ind. 215 (1870); *State v. Linsig*, 178 Iowa 484, 159 N. W. 995 (1916); *People v. DeRose*, 230 Mich. 180, 203 N. W. 95 (1925) (ordinance closing markets held authorized by police power); *In re Berman*, 344 Mich. 598, 75 N. W. 2d 8 (1956) (ordinance prohibiting sale of furniture held authorized by police power); *State v. Dean*, 149 Minn. 410, 184 N. W. 275 (1921); *Power v. Nordstrom*, 150 Minn. 228, 184 N. W. 967 (1921) (ordinance closing cinema, shows, theater, held authorized by police power); *Paramount-Richards Theatres, Inc., v. City of Hattiesburg*, 210 Miss. 271, 49 So. 2d 574 (1950); *State v. Loomis*, 75 Mont. 88, 242 P. 344 (1925) (closing dance halls); *Gundaker Central Motors, Inc. v. Gassert*, 23 N. J. 71, 127 A. 2d 566 (1956), app. dism'd for want of a substantial federal question, 354 U. S. 933 (automobile

not repugnant to religious freedom.<sup>99</sup> These decisions are assailed as latter-day justifications upon specious civil grounds of legislation whose religious purposes were either overlooked or concealed by the judges who passed upon it.

trading prohibited); *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541 (1896), writ of error dism'd, 170 U. S. 408 (barbering prohibited); *State v. Weddington*, 188 N. C. 643, 125 S. E. 257 (1924) (ordinance held authorized by police power); *State v. Haase*, 97 Ohio App. 377, 116 N. E. 2d 224 (1953); *Ex parte Johnson*, 20 Okla. Cr. 66, 201 P. 533 (1921) (ordinance closing cinema and theaters held authorized by police power); *Ex parte Johnson*, 77 Okla. Cr. 360, 141 P. 2d 599 (1943) (barbering prohibited); *Ex parte Northrup*, 41 Ore. 489, 69 P. 445 (1902) (barbering prohibited); *State v. Nicholls*, 77 Ore. 415, 151 P. 473 (1915); *Breyer v. State*, 102 Tenn. 103, 50 S. W. 769 (1899) (barbering prohibited); *State v. Sopher*, 25 Utah 318, 71 P. 482 (1903); *Norfolk & Western R. Co. v. Commonwealth*, 93 Va. 749, 24 S. E. 837 (1896) (statute prohibiting operation of railroads held sustainable as exercise of police power); *State v. Nichols*, 28 Wash. 628, 69 P. 372 (1902); *City of Seattle v. Gervasi*, 144 Wash. 429, 268 P. 328 (1927) (comprehensive ordinance found authorized by police power). See also *Kreider v. State*, 103 Ark. 438, 440, 147 S. W. 449, 450 (1912); *State v. Miller*, 68 Conn. 373, 377-378, 36 A. 795, 796 (1896); *State vs Diamond*, 56 N. D. 854, 857-858, 219 N. W. 831, 832-833 (1928); *Rich v. Commonwealth*, 198 Va. 445, 449, 453, 94 S. E. 2d 549, 552, 555 (1956). Compare *Racesetter Homes, Inc. v. Village of South Holland*, 18 Ill. 2d 247, 163 N. E. 2d 464 (1960), admitting legislative power to prohibit Sunday activity disturbing to the community, but striking down a blanket closing ordinance with virtually none of the usual exceptions as too extreme to be justified under this rationale.

<sup>99</sup> *E. g.*, *Frölickstein v. Mayor of Mobile*, 40 Ala. 725 (1867); *Lane v. McFadyen*, 259 Ala. 205, 66 So. 2d 83 (1953) (issue not raised by litigants; court nevertheless considers it); *Elliott v. State*, 29 Ariz. 389, 242 P. 340 (1926) (dictum); *Shover v. State*, 10 Ark. 259 (1850); *Scales v. State*, 47 Ark. 476, 1 S. W. 769 (1886); *Ex parte Koser*, 60 Cal. 157 (1882); *Karwisch v. Mayor of Atlanta*, 44 Ga. 204 (1871), settling the issue left open in *Sanders v. Johnson*, 29 Ga. 526 (1859); *Humphrey Chevrolet, Inc., v. City of Evanston*, 7 Ill. 2d 402, 131 N. E. 2d 70 (1955) (at least as applied to corporate and non-Sabbatarian parties); *State v. Etair*, 130 Kan. 863, 288 P. 729 (1930); *State v. Haining*, 131 Kan. 853, 293 P. 952 (1930); *Strand Amuse-*

Of course, it is for this Court ultimately to determine whether federal constitutional guarantees are observed or undercut. But this does not mean that we are to be indifferent to the unanimous opinion of genera-

*ment Co. v. Commonwealth*, 241 Ky. 48, 43 S. W. 2d 321 (1931), *semble*; *State v. Bott*, 31 La. Ann. 663 (1879) (forbidding liquor sales); *State ex rel. Walker v. Judge*, 39 La. Ann. 132, 1 So. 437 (1887); *Judefind v. State*, 78 Md. 510, 28 A. 405 (1894) (considered dictum); *Hiller v. State*, 124 Md. 385, 92 A. 842 (1914) (prohibiting sports); *Commonwealth v. Has*, 122 Mass. 40 (1877); *Commonwealth v. Chernock*, 336 Mass. 384, 145 N. E. 2d 920 (1957); *Scougale v. Sweet*, 124 Mich. 311, 82 N. W. 1061 (1900) (considered dictum); *State v. Petit*, 74 Minn. 376, 77 N. W. 225 (1898), *aff'd*, 177 U. S. 164; *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127 (1906); *State v. Amb*, 20 Mo. 214 (1854); *Komen v. City of St. Louis*, 316 Mo. 9, 289 S. W. 838 (1926) (closing bakeries, (subsequently overruled on another point)); *In re Caldwell*, 82 Neb. 544, 118 N. W. 133 (1908), *semble*; *Stewart Motor Co. v. City of Omaha*, 120 Neb. 776, 235 N. W. 322 (1931) (prohibiting automobile sales), *semble*; *Two Guys from Harrison, Inc., v. Furman*, 32 N. J. 199, 160 A. 2d 265 (1960); *Lindenmuller v. People*, 33 Barb. 548 (N. Y. Sup. Ct. 1861) (closing theaters); *Neuendorff v. Duryea*, 69 N. Y. 557 (1877) (same); *People v. Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), *app. dism'd* for want of a substantial federal question, 341 U. S. 907; *State v. McGee*, 237 N. C. 633, 75 S. E. 2d 783 (1953), *app. dism'd* for want of a substantial federal question, 346 U. S. 802; *State ex rel. Temple v. Barnes*, 22 N. D. 18, 132 N. W. 215 (1911) (closing theaters); *State v. Powell*, 58 Ohio St. 324, 50 N. E. 900 (1898) (prohibiting sports); *State v. Kidd*, 167 Ohio St. 521, 150 N. E. 2d 413 (1958), *app. dism'd* for want of a substantial federal question, 358 U. S. 131, 132; *Commonwealth v. Wolf*, 3 S. & R. 48 (Pa. 1817); *Specht v. Commonwealth*, 8 Pa. 312 (1848); *Commonwealth v. Bauder*, 188 Pa. Super. 424, 145 A. 2d 915 (1958); *City Council v. Benjamin*, 2 Strobl L. 508 (S. C. 1848); *Xenapas v. Richardson*, 149 S. C. 52, 146 S. E. 686 (1929); *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207 (1888); *Sayeg v. State*, 114 Tex. Cr. R. 153, 25 S. W. 2d 865 (1930), *semble*; *Clark v. State*, — Tex. Cr. R. —, 319 S. W. 2d 726 (1959), *semble*; *Pirkey Bros. v. Commonwealth*, 134 Va. 713, 114 S. E. 764 (1922) (issue not raised by litigants; court nevertheless considers it); *Crook v. Commonwealth*, 147 Va. 593, 136 S. E. 565 (1927) (same); *State v. Bergfeldt*, 41

tions of judges who, in the conscientious discharge of obligations as solemn as our own, have sustained the Sunday laws as not inspired by religious purpose. The Court did not ignore that opinion in *Friedman v. New York*, 341 U. S. 907; *McGee v. North Carolina*, 346 U. S. 802; *Kidd v. Ohio*, 358 U. S. 132; and *Ullner v. Ohio*, 358 U. S. 181, dismissing for want of a substantial federal question appeals from state decisions sustaining Sunday laws which were obnoxious to the same objections urged in the present cases.<sup>100</sup> I cannot ignore that consensus of view now

Wash. 234, 83 P. 177 (1905), writ of error dism'd, 210 U. S. 438 (prohibiting barbering); *State v. Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949). Following the decision in the *Gallagher* case below, and relying on it, a Pennsylvania Court of Quarter Sessions recently held the 1959 Pennsylvania Sunday retail sales act unconstitutional on the grounds that its incidence is discriminatory and arbitrary and that it operates to prefer Sunday-observing religions. *Commonwealth v. Cavaleira*, 142 Legal Intelligencer 519 (Phila., Ap. 22, 1960) (Pa. Q. S. 1960). Another Pennsylvania court of first impression shortly thereafter reached the same conclusions. *Bargain City U. S. A., Inc., v. Dilworth*, 142 Legal Intelligencer 813 (Phila., June 22, 1960) (Pa. C. P. 1960). These appear to be the only two standing state-court decisions striking down Sunday laws, as, in part, violative of religious freedom, in a century and a half of litigation.

In *District of Columbia v. Robinson*, 30 App. D. C. 283 (1908), the Court of Appeals, while recognizing the validity as civil regulations of modern Sunday closing statutes, held the 1723 Maryland Sunday law obsolete and inapplicable in the District of Columbia, largely on the ground that its purpose was religious. Compare *O'Hanlon v. Myers*, 10 Rich. L. 128 (S. C. 1856). In *Brunswick-Balke-Collander Co. v. Evans*, 228 F. 991 (D. C. D. Ore. 1916), app. dism'd, 248 U. S. 587, a Federal District Court sustained Oregon's general closing law against contentions that it violated religious freedom. Cf. *Swann v. Swann*, 21 F. 299 (C. C. E. D. Ark. 1884); *In re King*, 46 F. 905 (C. C. W. D. Tenn. 1891).

<sup>100</sup> Appeals in cases challenging Sunday laws as violative of the Due Process Clause were also dismissed for want of a substantial federal question in *Gundaker Central Motors, Inc., v. Gassert*, 354 U. S. 933, and *Grochowiak v. Pennsylvania*, 358 U. S. 47.

The statutes of Maryland, Massachusetts and Pennsylvania which we here examine are not constitutionally forbidden fusions of church and state.<sup>101</sup>

## V.

Appellees in the *Gallagher* case and appellants in the *Braunfeld* case contend that, as applied to them, Orthodox Jewish retailers and their Orthodox Jewish customers, the Massachusetts Lord's day statute and the Pennsylvania Sunday retail sales act violate the Due Process Clause of the Fourteenth Amendment because, in effect, the statutes deter the exercise and observance of their religion. The argument runs that by compelling the Sunday closing of retail stores and thus making unavailable for business and shopping uses one-seventh part of the week, these statutes force them either to give up the Sabbath observance—an essential part of their faith—or to forego advantages enjoyed by the non-Sabbatarian majority of the community. They point out, moreover, that because

<sup>101</sup> This does not, of course, imply an opinion of the legitimacy of all the Sunday provisions of all the States, or of every application of the statutes now before this Court. It is true that the Massachusetts courts have at times expressed an intention to apply the Massachusetts Lord's day statute in accordance with the temper in which its historical antecedents were enacted. Compare the language of *Davis v. City of Somerville*, 128 Mass. 594 (1880); *Commonwealth v. Dextra*, 143 Mass. 28, 8 N. E. 756 (1886); *Commonwealth v. White*, 190 Mass. 578, 77 N. E. 636 (1906); *Commonwealth v. McCarthy*, 244 Mass. 484, 138 N. E. 835 (1923), with the Virginia cases, *Francisco v. Commonwealth*, 180 Va. 371, 23 S. E. 2d 234 (1942), and *Rich v. Commonwealth*, 198 Va. 445, 94 S. E. 2d 549 (1956). See *Commonwealth v. Sampson*, 97 Mass. 407 (1867). But see *Stone v. Graves*, 145 Mass. 353, 13 N. E. 906 (1887). It will be time enough to pass upon the constitutionality of such applications as do not reasonably come within the rationale of the present decision, and of *Commonwealth v. Has*, 122 Mass. 40, 42 (1877), if and when those cases arise. See *Brattle Films, Inc. v. Commissioner of Public Safety*, 333 Mass. 58, 127 N. E. 2d 891 (1955).



of the prevailing five-day working week of a large proportion of the population, Sunday is a day peculiarly profitable to retail sellers and peculiarly convenient to retail shoppers. The records in these cases support them in this.

The claim which these litigants urge assumes a number of aspects. First, they argue that any one-common-day-of-closing regulation which selected a day other than their Sabbath would be *ipso facto* unconstitutional in its application to them because of its effect in preferring persons who observe no Sabbath, therefore creating economic pressures which urge Sabbatarians to give up their usage. The creation of this pressure by the Sunday statutes, it is said, is not so necessary a means to the achievement of the ends of day-of-rest legislation as to justify its employment when weighed against the injury to Sabbatarian religion which it entails. Six-day week regulation, with the closing day left to individual choice, is urged as a more reasonable alternative.

Second, they argue that even if legitimate state interests justify the enforcement against persons generally of a single common day of rest, the choice of Sunday as that day violates the rights of religious freedom of the Sabbatarian minority. By choosing a day upon which Sunday-observing Christians worship and abstain from labor, the statutes are said to discriminate between religions. The Sunday observer may practice his faith and yet work six days a week, while the observer of the Jewish Sabbath, his competitor, may work only during five days, to the latter's obvious disadvantage. Orthodox Jewish shoppers whose jobs occupy a five-day week have no week-end shopping day, while Sunday-observing Christians do. Leisure to attend Sunday services, and relative quiet throughout their duration, is assured by law, but no equivalent treatment is accorded to Friday evening and Saturday services. Sabbatarians feel that the power of the State is employed to coerce their observance of Sunday



as a holy day, that the State accords a recognition to Sunday Christian doctrine which is withheld from Sabbatarian creeds. All of these prejudices could be avoided, it is argued, without impairing the effectiveness of common-day-of-rest regulation, either by fixing as the rest time some day which is held sacred by no sect, or by providing for a Sunday work ban from which Sabbatarians are excepted; on condition of their abstaining from labor on Saturday. Failure to adopt these alternatives in lieu of Sunday statutes applicable to Sabbatarians is said to constitute an unconstitutional choice of means.

Finally, it is urged that if, as means, these statutes are necessary to the goals which they seek to attain, nevertheless the goals themselves are not of sufficient value to society to justify the disadvantage which their attainment imposes upon the religious exercise of Sabbatarians.

The first of these contentions has already been discussed. The history of Sunday legislation convincingly demonstrates that Sunday statutes may serve other purposes than the provision merely of one day of physical stoppage in seven. These purposes fully justify common-day-of-rest statutes which choose Sunday as the day.

In urging that an exception in favor of those who observe some other day as sacred would not defeat the ends of Sunday legislation, and therefore that failure to provide such an exception is an unnecessary—hence an unconstitutional—burden on Sabbatarians, the *Gallagher* appellees and *Braunfeld* appellants point to such exceptions in twenty-one of the thirty-four jurisdictions which have statutes banning labor or employment or the selling of goods on Sunday.<sup>102</sup> Actually, in less than half of

<sup>102</sup> Wisconsin, which does not have a general ban on Sunday labor, but does have a statute prohibiting automobile trading on that day, also makes an exception in favor of those who conscientiously observe the Jewish Sabbath. West's Wis. Stat. Ann., 1961 Supp., § 218.01 (3) (a) 21. Other jurisdictions having statutes which cover

these twenty-one States does the exemption extend to sales activity as well as to labor.<sup>103</sup> There are tenable reasons why a legislature might choose not to make such an

only one or a few enumerated activities provide no Sabbatarian exception. Fla. Laws 1959, Special Acts, c. 59-1650, a local-option shop-closing statute applicable to Orange County, does contain such an exception, and in Michigan there are similar excepting clauses attached to barbering and auto-trading bans as well as to the general Sunday laws. Mich. Stat. Ann., 1957 Rev. Vol., §§ 18.122, 9.2702.

<sup>103</sup> In Kansas, Massachusetts, Missouri, New Jersey, New York, North Dakota, Rhode Island, South Dakota, Texas, Washington, and probably in Connecticut and Maine, the exception does not cover the sale of goods. Kan. Gen. Stat. Ann., 1949, § 21-953, *State v. Haining*, 131 Kan. 853, 293 P. 952 (1930); Mass. Gen. Laws Ann., 1958, c. 136, § 6, *Commonwealth v. Has*, 122 Mass. 40 (1877); *Commonwealth v. Starr*, 144 Mass. 359, 11 N. E. 533 (1887); *Commonwealth v. Kirshen*, 194 Mass. 151, 80 N. E. 2 (1907); Vernon's Mo. Stat. Ann., 1953, § 563.700; N. J. Stat. Ann., 1953, § 2A:171-4; McKinney's N. Y. Laws, Pen. Law § 2144, *People v. Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), app. dism'd for want of a substantial federal question, 341 U. S. 907; cf. *People v. Adler*, 174 App. Div. 301, 160 N. Y. S. 539 (1916) (manufacturing activities); N. D. Century Code, 1960, § 12-21-17; R. I. Gen. Laws, 1956, § 11-40-4 (shops, mechanical work in compact places, etc.); S. D. Code, 1939, § 13.1710; Vernon's Tex. Stat., 1952, Pen. Code, Art. 284; Wash. Rev. Code, 1959, § 9.76.020, *State v. Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949); Conn. Gen. Stat. Rev., 1958, § 53-303; Me. Rev. Stat., 1954, c. 134, § 44. Cf. *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127 (1906). The exemption in Indiana, Kentucky, Michigan, Nebraska, Ohio, Oklahoma, Virginia and West Virginia does extend to selling, but in the last two named States an exempted person may not employ other persons not of his belief on Sunday. Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 10-4301; Ky. Rev. Stat., 1960, § 436.160, *Cohen v. Webb*, 175 Ky. 1, 192 S. W. 828 (1917); Mich. Stat. Ann., 1957 Rev. Vol., §§ 18.855, 18.856 (1), *Builders Assn. v. City of Detroit*, 295 Mich. 272, 294 N. W. 677 (1940), *semble*; Neb. Rev. Stat., 1956 Reissued Vol., § 28-940; Page's Ohio Rev. Code Ann., 1954, § 3773.24; Okla. Stat. Ann., 1958, Tit. 21, § 909, *Krieger v. State*, 12 Okla. Cr. 566, 160 P. 36 (1916); Va. Code, 1960 Replacement Vol., § 18.1-359; W. Va. Code Ann., 1955, c. 61, Art. 8, § 18 [6073]. The meaning of the provision in Illinois, Ill. Rev. Stat., 1959, c. 38, § 549, is not clear.

exception. To whatever extent persons who come within the exception are present in a community, their activity would disturb the atmosphere of general repose and reintroduce into Sunday the business tempos of the week. Administration would be more difficult, with violations less evident and, in effect, two or more days to police instead of one. If it is assumed that the retail demand for consumer items is approximately equivalent on Saturday and on Sunday, the Sabbatarian, in proportion as he is less numerous, and hence the competition, less severe, might incur through the exception a competitive advantage over the non-Sabbatarian, who would then be in a position, presumably, to complain of discrimination against *his* religion.<sup>104</sup> Employers who wished to avail themselves of the exception would have to employ only their co-religionists,<sup>105</sup> and there might be introduced into private employment practices an element of religious differentiation which a legislature could regard as undesirable.<sup>106</sup>

Finally, a relevant consideration which might cause a State's lawmakers to reject exception for observers of another day than Sunday is that administration of such

<sup>104</sup> See 101 H. L. Deb. 430 (5th ser. 1935-1936); 311 H. C. Deb. 492 (5th ser. 1935-1936). On this ground some state courts have even held Sabbatarian exceptions invalid as discriminatory. *City of Shreveport v. Levy*, 26 La. Ann. 671 (1874); *Kislingbury v. Treasurer of Plainfield*, 10 N. J. Misc. 798, 160 A. 654 (C. P. 1932). See *State v. Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949), reserving the question. However, in *Johns v. State*, 78 Ind. 332 (1881), the exemption was sustained.

<sup>105</sup> See Va. Code, 1960 Replacement Vol., § 18.1-359; W. Va. Code Ann., 1955, c. 61, Art. 8, § 18 [6073]; Factories Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 67, § 91.

<sup>106</sup> Both Pennsylvania and Massachusetts have fair employment practices acts prohibiting religious discrimination in hiring. Purdon's Pa. Stat. Ann., 1960 Supp., Tit. 43, §§ 951 to 963; Mass. Gen. Laws Ann., 1958, c. 151B, §§ 1 to 10.

a provision may require judicial inquiry into religious belief. A legislature could conclude that if all that is made requisite to qualify for the exemption is an abstinence from labor on some other day, there would be nothing to prevent an enterpriser from closing on his slowest business day, to take advantage of the whole of the profitable week-end trade, thereby converting the Sunday labor ban, in effect, into a day-of-rest-in-seven statute, with choice of the day left to the individual. All of the state exempting statutes seem to reflect this consideration. Ten of them require that a person claiming exception "conscientiously" believe in the sanctity of another day or "conscientiously" observe another day as the Sabbath.<sup>107</sup> Five demand that he keep another day as "holy time."<sup>108</sup> Three allow the exemption only to members of a "religious" society observing another day,<sup>109</sup> and a fourth provides for proof of membership in such a society by the certificate of a preacher or of any three adherents.<sup>110</sup> In Illinois the claimant must observe some day as a "Sabbath," and in New Jersey he must prove that he devotes that day to religious exercises.<sup>111</sup> Connecticut, one of the jurisdictions demanding conscientious belief, requires in addition that he who seeks the benefit

<sup>107</sup> Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Ohio, Texas, Virginia, West Virginia. Wisconsin's statute is similar.

<sup>108</sup> New York, North Dakota, Oklahoma, South Dakota, Washington.

<sup>109</sup> Kansas, Kentucky, Missouri.

<sup>110</sup> Rhode Island.

<sup>111</sup> This New Jersey excepting statute appears to be currently inoperative. The State's general labor ban has recently been held impliedly repealed by the enactment of a Sunday retail sales prohibition, *Two Guys from Harrison, Inc., v. Furman*, 32 N. J. 199, 160 A. 2d 265 (1960), and the excepting provision, by its terms, does not extend to Sunday selling by Sabbatarians.

of the exception file a notice of such belief with the prosecuting attorney.<sup>112</sup>

Indicative of the practical administrative difficulties which may arise in attempts to effect, consistently with the purposes of Sunday closing legislation, an exception for persons conscientiously observing another day as Sabbath, are the provisions of § 53 of the British Shops Act, 1950,<sup>113</sup> continuing in substance § 7 of the Shops (Sunday Trading Restriction) Act, 1936.<sup>114</sup> These were the product of experience with earlier forms of exemptions which had proved unsatisfactory,<sup>115</sup> and the new 1936 provisions were enacted only after the consideration and rejection of a number of proposed alternatives.<sup>116</sup> They allow shops

<sup>112</sup> And see *In re Berman*, 344 Mich. 598, 75 N. W. 2d 8 (1956), determining the posture under a conscientious-Sabbatarian exception of a Sabbatarian owner of three stores who operated one himself, closing on Saturdays and opening on Sundays, and the other two through agents, opening Saturdays and closing Sundays.

<sup>113</sup> 14 Geo. VI, c. 28.

<sup>114</sup> 26 Geo. V & 1 Edw. VIII, c. 53.

<sup>115</sup> Principally the Jewish exemption in the Hairdressers' and Barbers' Shops (Sunday Closing) Act, 1930, 20 & 21 Geo. V, c. 35, § 3. See 101 H. L. Deb. 439, 442 (5th ser. 1935-1936); 311 H. C. Deb. 502 (5th ser. 1935-1936). The 1930 act was repealed by the Shops Act, 1950, 14 Geo. VI, c. 28, Eighth Schedule, although § 67 of the latter act continues similar provisions for Scotland. The problem of special Sunday regulation for the Jewish population had involved Parliament at least since the turn of the century. Sections 47, 48 of the Factory and Workshop Act, 1901, 1 Edw. VII, c. 22, permitted Jewish employers certain exemptions from that act's prohibition of Sunday employment of women and children. The terms of the exemption are altered by the Factories Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 67, § 91. See also Report from the Select Committee of the House of Lords on the Sunday Closing (Shops) Bill [H. L.] (1905), 71-83, 142-147, 153-157.

<sup>116</sup> Among these was a provision permitting any shopkeeper in London to elect to close on Saturdays instead of Sundays. See 311 H. C. Deb. 447-461 (5th ser. 1935-1936). The Jewish exemption provisions of § 7 were the most strenuously debated provisions of

which are registered under the section and which remain closed on Saturday to open for trade until 2 p. m. on Sunday. Applications for registration must contain a declaration that the shop occupier "conscientiously objects on religious grounds to carrying on trade or business on the Jewish Sabbath,"<sup>117</sup> and any person who, to procure registration, "knowingly or recklessly makes an untrue statement or untrue representation," is subject to fine and imprisonment. Whenever upon representations made to them the local authority find reason to believe that a registered occupier is not a person of the Jewish religion or "that a conscientious objection on religious grounds . . . is not genuinely held," the authority may furnish particulars of the case to a tribunal established after consultation with the London Committee of Deputies of the British Jews,<sup>118</sup> which tribunal, if in their opinion the occupier is not a person of the Jewish religion or does not genuinely hold a conscientious objection to trade on the Jewish Sabbath, shall so report to the local authority; and upon this report the occupier's registration is to be revoked.<sup>119</sup> Surely, in light of the delicate enforce-

the Shops (Sunday Trading Restriction) Act. See 308 H. C. Deb. 2188-2192, 2202-2203, 2217 (5th ser. 1935-1936); 101 H. L. Deb. 263, 270, 427-434 (5th ser. 1935-1936); 311 H. C. Deb. 447-461, 478-507 (5th ser. 1935-1936). The recognized inadequacy of the exemption was in part responsible for the act's special provisions (§ 8) for the London area, where the bulk of the English Jewish trading population does business. *Id.*, at 2087, 2090-2091, 2103-2104.

<sup>117</sup> See the statutory form prescribed by the Shops Regulations, 1937, S. R. & O., 1937, No. 271, Schedules IV (a) and IV (b).

<sup>118</sup> The constitution of the tribunals for Jews and for Seventh Day Adventists (see note 119, *infra*) and the procedures of the tribunals are prescribed by the Shops Regulations, 1937, S. R. & O., 1937, No. 271, Reg. 4; and the Shops (Procedure for Jewish Tribunals) Regulations, 1937, S. R. & O., 1937, No. 1038.

<sup>119</sup> Other provisions indicate the intricate problems of administration which the exemption raises. Section 53 (3) provides that in the case of shops occupied by a partnership or company the application



ment problems to which these provisions bear witness, the legislative choice of a blanket Sunday ban applicable to observers of all faiths cannot be held unreasonable. A legislature might in reason find that the alternative of exempting Sabbatarians would impede the effective operation of the Sunday statutes, produce harmful collateral effects, and entail, itself, a not inconsiderable intrusion into matters of religious faith. However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it.

It cannot, therefore, be said that Massachusetts and Pennsylvania have imposed gratuitous restrictions upon the Sunday activities of persons observing the Orthodox Jewish Sabbath in achieving the legitimate secular ends at which their Sunday statutes may aim. The remaining question is whether the importance to the public of those ends is sufficient to outweigh the restraint upon the religious exercise of Orthodox Jewish practitioners which the restriction entails. See *Prince v. Massachusetts*, 321

of the exemption is determined by the religion of the majority of the partners or directors. Section (5) prohibits the occupier of a shop registered for the exemption from keeping open any other shop on Saturday, and prohibits any person who has made a statutory declaration of conscientious objection for purposes of registration from working in, or employing any other person in, or being concerned in the control of a firm which employs any other person in, a shop open on Saturday. Compare *In re Berman*, note 112, *supra*. Subsection (9) permits cancellation of the registration of any shop at the application of the occupier, but provides that registration shall not be cancelled within twelve months of the date upon which application for registration was made; and subsection (10) precludes the same occupier's again registering the shop for exemption. Section 53 (12) makes the exception provisions applicable as well to members of any religious body regularly observing the Jewish Sabbath as to Jews, and provides that for such persons the function served in the case of Jews by the London Committee of Deputies of the British Jews shall be served by "such body as appears to the Secretary of State to represent such persons."



U. S. 158; *Cox v. New Hampshire*, 312 U. S. 569. The nature of the legislative purpose is the preservation of a traditional institution which assures to the community a time during which the mind and body are released from the demands and distractions of an increasingly mechanized and competition-driven society. The right to this release has been claimed by workers and by small enterprisers, especially by retail merchandisers, over centuries, and finds contemporary expression in legislation in three-quarters of the States. The nature of the injury which must be balanced against it is the economic disadvantage to the enterpriser, and the inconvenience to the consumer, which Sunday regulations impose upon those who choose to adhere to the Sabbatarian tenets of their faith.

These statutes do not make criminal, do not place under the onus of civil or criminal disability, any act which is itself prescribed by the duties of the Jewish or other religions. They do create an undeniable financial burden upon the observers of one of the fundamental tenets of certain religious creeds, a burden which does not fall equally upon other forms of observance. This was true of the tax which this Court held an unconstitutional infringement of the free exercise of religion in *Follett v. Town of McCormick*, 321 U. S. 573. But unlike the tax in *Follett*, the burden which the Sunday statutes impose is an incident of the only feasible means to achievement of their particular goal. And again unlike *Follett*, the measure of the burden is not determined by fixed legislative decree, beyond the power of the individual to alter. Upon persons who earn their livelihood by activities not prohibited on Sunday, and upon those whose jobs require only a five-day week, the burden is not considerable. Like the customers of Crown Kosher Super Market in the *Gallagher* case, they are inconvenienced in their shopping. This is hardly to be assessed as an injury of preponderant

constitutional weight. The burden on retail sellers competing with Sunday-observing and non-observing retailers is considerably greater. But, without minimizing the fact of this disadvantage, the legislature may have concluded that its severity might be offset by the industry and commercial initiative of the individual merchant. More is demanded of him, admittedly, whether in the form of additional labor or of material sacrifices, than is demanded of those who do not choose to keep his Sabbath. More would be demanded of him, of course, in a State in which there were no Sunday laws and in which his competitors chose—like Two Guys from Harrison—to do business seven days a week. In view of the importance of the community interests which must be weighed in the balance, is the disadvantage wrought by the non-exempting Sunday statutes an impermissible imposition upon the Sabbatarian's religious freedom? Every court which has considered the question during a century and a half has concluded that it is not.<sup>120</sup> This Court so concluded in *Friedman v. New York*, 341 U. S. 907. On the

<sup>120</sup> *Frolickstein v. Mayor of Mobile*, 40 Ala. 725 (1867); *Scales v. State*, 47 Ark. 476 (1886); *State v. Haining*, 131 Kan. 853, 293 P. 952 (1930); *Commonwealth v. Has*, 122 Mass. 40 (1877); *Commonwealth v. Chernock*, 336 Mass. 384, 145 N. E. 2d 920 (1957); *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127 (1906); *Komen v. City of St. Louis*, 316 Mo. 9, 289 S. W. 838 (1926) (subsequently overruled on another point); *State v. Fass*, 62 N. J. Super. 265, 162 A. 2d 608 (County Ct. 1960); *People v. Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), app. dism'd for want of a substantial federal question, 341 U. S. 907; *Silverberg Bros. v. Douglass*, 62 Misc. 340, 114 N. Y. S. 824 (Sup. Ct. 1909); *Commonwealth v. Wolf*, 3 S. & R. 48 (Pa. 1817); *Specht v. Commonwealth*, 8 Pa. 312 (1848); *City Council v. Benjamin*, 2 Strob. L. 508 (S. C. 1848); *Xepapas v. Richardson*, 149 S. C. 52, 146 S. E. 686 (1929), *semble*; *State v. Bergfeldt*, 41 Wash. 234, 83 P. 177 (1905), writ of error dism'd, 210 U. S. 438 (prohibiting barbering). And see *State ex rel. Walker v. Judge*, 39 La. Ann. 132, 141, 1 So. 437, 44 (1887); cf. *Ex parte Sundstrom*, 25 Tex. App. 133 (1888).

basis of the criteria for determining constitutionality, as opposed to what one might desire as a matter of legislative policy, a contrary conclusion cannot be reached.

## VI.

Two further grounds of unconstitutionality are urged in all these cases, based upon the selection in the challenged statutes of the activities included in, or excluded from, the Sunday ban. First it is argued that, if the aim of the statutes is to secure a day of peace and repose, the laws of Massachusetts and Maryland, by their exceptions, and the retail sales act of Pennsylvania, by its enumeration of the articles whose sale is forbidden, operate so imperfectly in the service of this aim—show so little rational relation to it—that they must be accounted as arbitrary and therefore violative of due process. The extensive range of recreational and commercial Sunday activity permitted in these States is said to deprive the statutes of any reasonable basis. The distinctions drawn by the laws between what may be sold or done and what may not, it is claimed, are unsupported by reason. Second, these claimants argue that the same discriminations between items which may and may not be sold, and in some cases between the persons who may and those who may not sell identical items, deprive them of the equal protection of the laws.

Although these contentions require the Court to examine separately and with particularity the provisions of each of the three States' statutes which are attacked, the general considerations which govern these cases are the same. It is clear that in fashioning legislative remedies by fine distinctions to fit specific needs, "The range of the State's discretion is large." *Bain Peanut Co. v. Pinson*, 282 U. S. 499, 501. This is especially so where, by the nature of its subject, regulation must take account

of traditional and prevailing local customs. See *Kotch v. Board of River Port Pilot Comm'rs*, 330 U. S. 552. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U. S. 141, 147. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical, Inc.*, 348 U. S. 483, 489.

Neither the Due Process nor the Equal Protection Clauses demand logical tidiness. *Metropolis Theatre Co. v. City of Chicago*, 228 U. S. 61. No finicky or exact conformity to abstract correlation is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. See *Goesaert v. Cleary*, 335 U. S. 464. And what degree of uniformity reason demands of a statute is, of course, a function of the complexity of the needs which the statute seeks to accommodate.

In the case of Sunday legislation, an extreme complexity of needs is evident. This is so, first, because one of the prime objectives of the legislation is the preservation of an atmosphere—a subtle desideratum, itself the product of a peculiar and changing set of local circumstances and local traditions. But in addition, in the achievement of that end, however formulated, numerous compromises

must be made. Not all activity can halt on Sunday. Some of the very operations whose doings most contribute to the rush and clamor of the week must go on throughout that day as well, whether because life depends upon them, or because the cost of stopping and restarting them is simply too great, or because to be without their services would be more disruptive of peace than to have them continue. Many activities have a double aspect: providing entertainment or recreation for some persons, they entail labor and workday tedium for others.<sup>121</sup> Cogent expression of the intricate problems which these various countervailing pressures pose was given by Mr. Lloyd in the course of the debate in Commons on the English Sunday closing act of 1936:

"We should all like to see shopkeepers and their staffs as far as possible in a position to observe Sunday in a normal way like most other people. On the other hand, we know that there are certain reasonable needs of the public which require to be met even on a Sunday, and I think we should also all agree

<sup>121</sup> Consider Mr. Loftus's comments on the proposed Shops (Sunday Trading Restriction) Bill before the House of Commons in 1936: "During the last 20 years there has been a very great change in the habits of our people—a change for the better. Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer, and that is good for their health. It is good for the mind as well as the body that they should do so. Going into the country... they have been accustomed to certain facilities in the way of obtaining refreshment, fresh fruit, flowers and vegetables to bring home, and it would be regretted, particularly by the working classes, if there was any interference by legislation that would stop those facilities or check the tendency of our people to go into the country and to take advantage of the amenities of the countryside."

"The first principle is to frame such exemptions as will not unduly interfere with the ordinary health and habits of our people." 308 H.C. Deb. 2159 (5th ser. 1935-1936).

that the fewest possible number of people should have to give up their Sunday in order to cater for those public needs. I think we should probably reach a large measure of general agreement on the principle that only those shops should remain open which are essential to meet the requirements of the public and only to the extent that they are essential. . . . Therefore, the problem is to strike a just balance between the reasonable needs of the public and the equally reasonable desire of the great bulk of those engaged in the distributive trades to enjoy their share of Sunday rest and recreation.

"If that is accepted, it follows at once that the crux of any Bill of this kind lies in the scope and the nature of the exemptions to the general principle of closing on Sunday. . . ."<sup>122</sup>

Moreover, the variation from activity to activity in the degree of disturbance which Sunday operation entails, and the similar variation in degrees of temptation to flout the law, and in degrees of ability to absorb and ignore various legal penalties, make exceedingly difficult the devising of effective, yet comprehensively fair, schemes of sanctions.

Early in the history of the Sunday laws there developed mechanisms which served to adapt their wide general prohibitions both to practical exigencies and to the evolving concerns and desires of the public.—Where it was found that persons in certain activities tended with particular frequency to engage in violations, those activities were singled out for harsher punishment.<sup>123</sup> On the other

<sup>122</sup> *Id.*, at 2200-2201.

<sup>123</sup> The statute 29 Charles II, c. 7, punished worldly labor of one's ordinary calling by a forfeiture of five shillings; punished traveling by drovers or butchers by a forfeiture of twenty shillings, and punished the exhibition of merchandise for sale by forfeiture of the goods. Early American colonial legislation similarly provided greater fines



hand, practices found necessary or convenient to popular habits were specifically excepted from the ban.<sup>124</sup> Under the basic English Sunday statute, 29 Charles II, c. 7, a wide general exception obtained for "Works of Necessity and Charity";<sup>125</sup> this provision found its way into the American colonial laws,<sup>126</sup> and has descended into all of their successors currently in force.<sup>127</sup> The effect of the phrase has been to give the courts a wide range of discretion in determining exceptions. But reasonable men can and do differ as to what is "necessity."<sup>128</sup> In every juris-

for engaging in some than in other Sunday activity. See, e. g., Delaware, 1740; Massachusetts, 1692; New Hampshire, 1700; New Jersey, 1798.

<sup>124</sup> The statute 29 Charles II, c. 7, itself contained several exceptions, and subsequent statutes added others. See notes 15, 18, *supra*. The original Sunday edict of Constantine in 321 A. D. had exempted farm labor.

<sup>125</sup> The statute 27 Henry VI, c. 5, had excepted "necessary victual" from its prohibition of sales at fairs and markets; 5 & 6 Edw. VI, c. 3, had contained a broad exception for labor at harvest or at any other time in the year when necessity required.

<sup>126</sup> See, e. g., Jefferson's bill quoted in text at note 68, *supra*. Other laws made specific exceptions as well: the Pennsylvania statute of 1705, for example, exempted not only works of necessity and charity but the dressing of victuals in cookshops, watermen landing passengers, butchers slaughtering and selling meat or fishermen selling fish in the morning in summer, and the sale of milk before 9 a. m. and after 5 p. m.

<sup>127</sup> Where statutes ban the keeping open of places of business as well as laboring, the exception is frequently worded to apply only to the latter. See *Commonwealth v. Dextra*, 143 Mass. 28 (1886).

<sup>128</sup> See *Williams v. State*, 167 Ga. 160, 144 S. E. 745 (1928) (sale of gasoline is necessity); *Jacobs v. Clark*, 112 Vt. 484, 28 A. 2d 369 (1942) (same is not necessity); *Commonwealth v. Louisville & Nashville R. Co.*, 80 Ky. 291 (1882) (operating railroad is necessity); cf. *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209 (1881); *Sparhawk v. Union Passenger R. Co.*, 54 Pa. 401 (1867) (same is not necessity); *State v. Needham*, 134 Kan. 155, 4 P. 2d 464 (1931) (distribution of newspapers is necessity); *Commonwealth v. Mat-*

diction legislatures, presumably deeming themselves fitter tribunals for decisions of this sort than were courts, acted to resolve the question against, or in favor of, various particular activities. Some pursuits were expressly declared not works of necessity, or were specially banned.<sup>129</sup>

*theus*, 132 Pa. 166, 25 A. 548 (1893) (same is not necessity); *Augusta & S. R. Co. v. Renz*, 55 Ga. 126 (1875) (operating streetcar is necessity); *Johnston v. Commonwealth*, 22 Pa. 102 (1853) (operating bus is not necessity); *Turner v. State*, 67 Ind. 595 (1879) (cutting ripe wheat is necessity); *State v. Goff*, 20 Ark. 289 (1859) (same is not necessity); *Wilkinson v. State*, 59 Ind. 416 (1877) (hauling ripe watermelons is necessity); *Commonwealth v. White*, 190 Mass. 578, 77 N. E. 636 (1906) (picking ripe cranberries is not necessity); *Rich v. Commonwealth*, 198 Va. 445, 94 S. E. 2d 549 (1956) (where evidence of widespread retail sale of groceries is not rebutted, jury cannot find that sale of groceries is not necessity); *State v. James*, 81 S. C. 197, 62 S. E. 214 (1908) (sale of ice and meat is not necessity); *State v. Corologos*, 101 Vt. 300, 143 A. 284 (1928) (sale of confectionery is not necessity as matter of law, although jury could so find); cf. *State ex rei. Smith v. Wertz*, 91 W. Va. 622, 114 S. E. 242 (1922); *Thompson v. City of Atlanta*, 178 Ga. 281, 172 S. E. 915 (1934), and *Rosenbaum v. State*, 131 Ark. 251, 199 S. W. 388 (1917) (operation of motion picture theater is not necessity); *Williams v. Commonwealth*, 179 Va. 741, 750, 20 S. E. 2d 493, 496 (1942) (concurring opinion) (operation of motion picture theater is necessity); *McGatrick v. Wason*, 4 Ohio St. 566 (1855) (loading ship with navigation-closing weather impending is necessity); *Commonwealth v. Sampson*, 97 Mass. 407 (1867) (gathering seaweed which tide threatens to float away is not necessity); *Hennersdorf v. State*, 25 Tex. App. 597, 8 S. W. 926 (1888) (manufacturing ice is necessity); *State v. McBee*, 52 W. Va. 257, 43 S. E. 121 (1902) (pumping oil is not necessity as matter of law, although jury could so find); *State v. Ohmer*, 34 Mo. App. 115 (1889) (retail sale of tobacco is not necessity); *Francisco v. Commonwealth*, 180 Va. 371, 23 S. E. 2d 234 (1942) (jury may find retail sale of beer necessity).

<sup>129</sup> In *Petit v. Minnesota*, 177 U. S. 164, this Court sustained against a claim of arbitrary classification a statute which in express terms provided that its exception for works of necessity should not include barbering. In other jurisdictions the same result was reached by judicial interpretation of the "necessity" clause. *State v. Linsig*,

Others were expressly permitted: series of exceptions, giving the laws resiliency in the course of cultural change proliferated.<sup>130</sup> Today, as Appendix II to this opinion shows, the general pattern in over half of the States and in England<sup>131</sup> is similar. Broad general prohibitions are

178 Iowa 484, 159 N. W. 995 (1916); *Ex parte Kennedy*, 42 Tex. Cr. R. 148, 58 S. W. 129 (1900); *State v. Sopher*, 25 Utah 318, 71 P. 482 (1903). Cf. *Commonwealth v. Dextra*, 143 Mass. 28, 8 N. E. 756 (1886); *Stark v. Backus*, 140 Wis. 557, 123 N. W. 98 (1900). Statutes prohibiting Sunday barbering were enacted in a number of States. These were voided as discriminatory in *Ex parte Jentzsch*, 112 Cal. 468, 44 P. 803 (1896); *Eden v. People*, 161 Ill. 296, 43 N. E. 1108 (1896); *Armstrong v. State*, 170 Ind. 188, 84 N. E. 3 (1908); *State v. Granneman*, 132 Mo. 326, 33 S. W. 784 (1896); cf. *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401 (1888), but have been generally sustained. *McClelland v. City of Denver*, 36 Colo. 486, 86 P. 126 (1906); *State v. Murray*, 104 Neb. 51, 175 N. W. 606 (1919); *People v. Bellet*, 99 Mich. 151, 57 N. W. 1094 (1894); *People v. Harnor*, 149 N. Y. 195, 43 N. E. 541 (1896), writ of error dismd., 170 U. S. 408; *Ex parte Johnson*, 77 Okla. Cr. 360, 141 P. 2d 599 (1943); *Ex parte Northrup*, 41 Ore. 489, 69 P. 445 (1902); *Breyer v. State*, 102 Tenn. 103, 50 S. W. 769 (1899); *State v. Bergfeldt*, 41 Wash. 234, 82 P. 177 (1905), overruling *City of Tacoma v. Krech*, 15 Wash. 296, 46 P. 255 (1896).

<sup>130</sup> One may trace in these exceptions the evolving habits of life of the people. Compare *State v. Hogreiver*, 152 Ind. 652, 58 N. E. 921 (1899), sustaining a statute specifically prohibiting Sunday baseball, with *Carr v. State*, 175 Ind. 241, 93 N. E. 1071 (1911), sustaining a statute excepting baseball from the general Sunday prohibition.

<sup>131</sup> The Shops Act, 1950, 14 Geo. VI, c. 28, excepts from the general Sunday ban the keeping open of a shop to sell liquor, meals or refreshments (whether or not for consumption on the premises, but excluding fried fish and chips sold at a fish and chip shop), newly cooked provisions and cooked tripe, table waters, chocolates, sweets, sugar confectionery and ice cream, flowers, fruit and vegetables (other than tinned), milk and cream (other than tinned), medicines and medical and surgical appliances (by certain registered shops), aircraft, motor or cycle supplies or accessories, tobacco and smokers' requisites, newspapers, periodicals and magazines, books and stationery at rail and bus terminals and aerodromes, guide books,

qualified by numerous precise exemptions, often with provision for local variation within a State, and are frequently bolstered by special provisions more heavily penalizing named activities. The regulations of Maryland, Massachusetts and Pennsylvania are not atypical

photographs, reproductions, photographic films and plates and souvenirs at public or specially approved galleries, museums, etc., passport photos, requisites for games or sports sold on the premises where the sport is played, fodder for horses, mules, etc. Post office and funeral business is permitted. (§ 47 & Fifth Schedule.) Local authority may permit the opening of shops before 10 a. m. for the sale of bread and flour confectionery, fish, groceries and grocer's products. (§ 48 & Sixth Schedule.) Local authority may prohibit sales of meals and refreshments for consumption off the premises (exempted by the Fifth Schedule) in the case of classes of shops in which sales for on-the-premises consumption do not constitute a substantial part of the business carried on. (§ 49.) Where the area of a local authority is a district frequented as a holiday resort during certain seasons of the year, the local authority may provide by order that shops of such classes as it designates may open on specified Sundays (not to exceed eighteen per year) for the sale of bathing and fishing articles, photographic requisites, toys, souvenirs and fancy goods, books, stationery, photographs, reproductions and postcards, and food. (§ 51 & Seventh Schedule.) Special provisions applicable to the London area permit local councils to authorize the opening before 2 p. m. of shops where street markets or (in some regions) shops were customarily opened on Sunday prior to the date of the original act, 1936, where, in the latter case, the council find that "having regard to the character and habits of the population in the district," Sunday closing would cause undue hardship; but if such an exempting order is made, it must fix some weekday closing day for these shops, which may differ for different classes of shops. (§ 54.) In the case of these local exempting orders, provision is made for a plebiscite among the shopkeepers affected. (§§ 52, 54 (1), par. 2.) The act further excepts the sale and delivery of stores or necessities to arriving or departing ships and aircraft and of goods to private clubs for club purposes, the cooking before 1:30 p. m. of food brought by customers to be cooked for consumption that day, and attendance of a barber upon invalids or upon residents of hotels or clubs therein. (§ 56.) This summary digest can scarcely suggest the complexity of the text.

in this regard, although they are undoubtedly among the more complex of the statutory patterns.

The degree of explicitness of these provisions in so many jurisdictions demonstrates the intricacy of the adjustments which they are designed to make. How delicate those adjustments can be is strikingly illustrated, once again, by a remark of the sponsor of the British closing bill of 1936, the most extensively documented modern Sunday statute. Supporting an amendment which permitted local authority to authorize the opening, during a portion of the year, of shops in areas frequented as seaside resorts, Mr. Loftus said:

"... In a Bill such as this one must have elasticity. ... We had a unanimous demand from the Association of Fish Fryers, representing the trade all over England, asking that fish-frying shops should be closed on Sundays, and we agreed and took them out of the First Schedule [which exempts shops selling meals or refreshments]. But then we heard from Blackpool, which is visited every year by, I suppose, millions of poor people, cotton operatives and others, who like to get cheap meals of fried fish on Sunday afternoons and Sunday evenings, and we feel there must be some provision in the Bill to allow the grant of exemptions in such a case. The difficulty is to avoid putting in a Clause which is open to abuse and I submit that there are two provisions which provide a safeguard. The first is that the local authority must approve the granting of exemptions, and the second is that the local authority cannot approve unless two-thirds of those particular shops in its locality are in favour of exemption. Having no desire that hardships should be inflicted on poor class people I would ask the House to accept the Clause."<sup>132</sup>

Certainly, when relevant considerations of policy demand decisions and distinctions so fine, courts must accord to the legislature a wide range of power to classify and to delineate. It is true that, unlike their virtually unanimous attitude on the issue of religious freedom, state courts have not always sustained Sunday legislation against the charge of unconstitutional discrimination. Statutes and ordinances have been struck down as arbitrary<sup>133</sup> or as violative of state constitutional prohibitions of special legislation.<sup>134</sup> A far greater number of courts, in

<sup>133</sup> *Elliott v. State*, 29 Ariz. 389, 242 P. 340 (1926) (banning enumerated businesses; court distinguishes general closing statute with exceptions); *Bocci & Sons Co. v. Town of Lawndale*, 208 Cal. 729, 254 P. 654 (1930) (exceptions for classes of businesses); *Justesen's Food Stores, Inc., v. City of Tulare*, 12 Cal. 2d 324, 84 P. 2d 140 (1938) (closing food stores; exceptions for classes of businesses); *Drese v. City of Lodi*, 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937) (exceptions for classes of businesses); *Allen v. City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1937) (exceptions for classes of businesses and commodities); *Henderson v. Antonacci*, 62 So. 2d 5 (Fla. 1952) (exceptions for classes of businesses and commodities); *Kelly v. Blackburn*, 95 So. 2d 260 (Fla. 1957) (exceptions for newspapers and cinema); *City of Mt. Vernon v. Julian*, 369 Ill. 447, 17 N. E. 2d 52 (1938) (exceptions for classes of businesses); *Auto-Rite Supply Co. v. Mayor of Woodbridge*, 41 N. J. Super. 303, 124 A. 2d 612 (1956), aff'd on other grounds, 25 N. J. 188, 135 A. 2d 515 (1957) (banning sale of enumerated classes of commodities); *Chan Sing v. Astoria*, 79 Ore. 411, 155 P. 378 (1916) (closing shops selling enumerated classes of commodities); *Broadbent v. Gibson*, 105 Utah 53, 140 P. 2d 939 (1943) (exceptions for classes of businesses, some restricted to sale of specified commodities); *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948) (sales ban with exceptions for classes of commodities; court distinguishes statutory scheme banning all labor and sales with exceptions). Cf. *State v. Trahan*, 214 La. 100, 36 So. 2d 652 (1948), and *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N. W. 2d 643 (1951) (exceptions for classes of businesses), holding unconstitutional Sunday statutes in particular applications deemed discriminatory.

<sup>134</sup> *City of Denver v. Bach*, 26 Colo. 530, 58 P. 1089 (1899) (closing classes of businesses); *City of Springfield v. Smith*, 322 Mo. 1129, 19



similar classes of cases, have sustained the legislation.<sup>132</sup> But the very diversity of judicial opinion as to what is reasonable classification—like the conflicting views on what is such “necessity” as will justify Sunday operations—tes-

S. W. 2d 1 (1929) (banning enumerated entertainments); *Ex parte Ferguson*, 62 Okla. Cr. 145, 70 P. 2d 1094 (1937) (banning sale of enumerated commodities), (alternative holding); *Ex parte Hodges*, 55 Okla. Cr. 69, 83 P. 2d 201 (1938) (exceptions for classes of businesses) (alternative holding). Cf. *McKaig v. Kansas City*, 363 Mo. 1033, 256 S. W. 2d 815 (1953) (automobile sales), disapproving *City of St. Louis v. DeLassus*, 205 Mo. 578, 104 S. W. 12 (1907), and *Komen v. City of St. Louis*, 316 Mo. 9, 289 S. W. 838 (1926).

<sup>133</sup> *Lane v. McFadyen*, 259 Ala. 205, 66 So. 2d 83 (1953) (banning merchandising with exceptions for classes of businesses); *Taylor v. City of Pine Bluff*, 226 Ark. 309, 289 S. W. 2d 679 (1956) (ordinance applied only to single class of business); *Hickinbotham v. Williams*, 227 Ark. 126, 296 S. W. 2d 897 (1956) (banning enumerated businesses); *Ex parte Koser*, 60 Cal. 177 (1882) (exceptions for classes of businesses); *In re Sumida*, 177 Cal. 388, 170 P. 823 (1918) (exceptions for classes of businesses); *State v. Hurliman*, 143 Conn. 502, 123 A. 2d 767 (1956) (exceptions for classes of services, activities and commodities, the latter to be sold by persons who sell them on weekdays); *State v. Shuster*, 145 Conn. 554, 145 A. 2d 196 (1958) (same); *Theisen v. McDavid*, 34 Fla. 440, 16 So. 321 (1894) (excepting sales of classes of commodities); *State v. Dolan*, 13 Idaho 693, 92 P. 995 (1907) (exceptions for classes of services and commodities); *State v. Cranston*, 59 Idaho 561, 85 P. 2d 682 (1938) (exceptions for classes of businesses, services and commodities); *Humphrey Chevrolet, Inc., v. City of Evanston*, 7 Ill. 2d 402, 131 N. E. 2d 70 (1955) (exceptions for classes of commodities); *Ness v. Supervisors of Elections*, 162 Md. 529, 160 A. 8 (1932) (unspecified); *People v. DeRose*, 230 Mich. 180, 203 N. W. 95 (1925) (banning classes of businesses and sales of classes of commodities); *People v. Krotkiewicz*, 286 Mich. 644, 282 N. W. 852 (1938) (banning sales of classes of commodities); *People's Appliance, Inc., v. City of Flint*, 358 Mich. 34, 99 N. W. 2d 522 (1959) (banning businesses selling classes of commodities); *State ex rel. Hoffman v. Justus*, 91 Minn. 447, 98 N. W. 325 (1904) (exceptions for classes of commodities); *Liberman v. State*, 26 Neb. 464, 42 N. W. 419 (1889) (exceptions for classes of businesses and commodities); *In re Caldwell*, 82 Neb. 544, 118 N. W. 133 (1908) (“common” labor banned); *State v. Somberg*, 113 Neb. 761, 204 N. W. 788 (1925)

tifies that the question of inclusion with regard to Sunday bans is one where judgments rationally differ, and hence where a State's determinations must be given every fair presumption of a reasonable support in fact. The re-

(banning classes of businesses and sales of classes of commodities): *City of Elizabeth v. Windsor-Fifth Avenue, Inc.*, 31 N. J. Super. 187, 106 A. 2d 9 (1954) (banning businesses selling classes of commodities); *Masters-Jersey, Inc., v. Mayor of Paramus*, 32 N. J. 296, 160 A. 2d 841 (1960) (exceptions for classes of commodities); *Richman v. Board of Comm'rs*, 122 N. J. L. 180, 4 A. 2d 501 (1939) (banning businesses selling a class of commodities, *semble*); *People v. Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), app. dism'd for want of a substantial federal question, 341 U. S. 907 (exceptions for classes of businesses, commodities, other activities); *State v. Medlin*, 170 N. C. 682, 86 S. E. 597 (1915) (exception for a class of business, restricted to sale of specified classes of commodities); *State v. Trantham*, 230 N. C. 641, 55 S. E. 2d 198 (1949) (exceptions for classes of commodities to be sold by classes of businesses); *State v. McGee*, 237 N. C. 633, 75 S. E. 2d 783 (1953), app. dism'd for want of a substantial federal question, 346 U. S. 802 (exceptions for classes of businesses, commodities, other activities); *State v. Towery*, 239 N. C. 274, 79 S. E. 2d 513 (1954), app. dism'd for want of a substantial federal question, 347 U. S. 925 (exceptions for classes of businesses, some restricted to sales of specified classes of commodities); *State v. Diamond*, 56 N. D. 854, 219 N. W. 831 (1928) (exceptions for classes of commodities); *State v. Haase*, 97 Ohio App. 377, 116 N. E. 2d 224 (1953) (exceptions for classes of recreational activities); *State v. Kidd*, 167 Ohio St. 521, 150 N. E. 2d 413 (1958), app. dism'd for want of a substantial federal question, 358 U. S. 131, 132 (exceptions for classes of recreational activities); *Commonwealth v. Bauder*, 188 Pa. Super. 424, 145 A. 2d 915 (1958) (exceptions for classes of recreational activities); *Bothwell v. York City*, 291 Pa. 363, 140 A. 130 (1927) (banning classes of recreational activities); *Mayor of Nashville v. Linck*, 80 Tenn. 499 (1883) (exceptions for sales of classes of commodities by classes of businesses); *Kirk v. Olgiati*, 203 Tenn. 1, 308 S. W. 2d 471 (1957) (banning classes of businesses); *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207 (1888) (exceptions for classes of commodities); *Searcy v. State*, 40 Tex. Cr. R. 460, 51 S. W. 1119 (1899) (exceptions for classes of commodities); *Sayeg v. State*, 114 Tex. Cr. R. 153, 25 S. W. 2d 865 (1930) (exceptions for classes of commodities); *City of Seattle v. Gervasi*, 144 Wash. 429, 258 P. 328

stricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause is of long standing: *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79. The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute

(1927) (exceptions for classes of commodities); *State v. Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949) (exceptions for classes of commodities). See also *Rosenbaum v. City & County of Denver*, 102 Colo. 530, 81 P. 2d 760 (1938) (banning automobile trading); *Mosko v. Dunbar*, 135 Colo. 172, 309 P. 2d 581 (1957) (banning automobile trading); *Gillooley v. Vaughan*, 92 Fla. 943, 110 So. 653 (1926) (banning classes of amusements); *Stewart Motor Co. v. City of Omaha*, 120 Neb. 776, 235 N. W. 332 (1931) (banning automobile trading); *ABC Liquidators, Inc., v. Kansas City*, 322 S. W. 2d 876 (Mo. 1959) (banning auctions); *State v. Loomis*, 75 Mont. 88, 242 P. 344 (1925) (banning, e. g., classes of dance halls); *Gundaker Central Motors, Inc. v. Gassert*, 23 N. J. 71, 127 A. 2d 566 (1956), app. dism'd for want of a substantial federal question, 354 U. S. 933 (banning automobile trading); *Ex parte Johnson*, 20 Okla. Cr. 66, 201 P. 533 (1921) (banning cinema and theaters); *Consolidated Enterprises, Inc., v. State*, 150 Tenn. 148, 263 S. W. 74 (1924) (banning cinema and theaters). Statutory provisions whose effect was to punish some Sunday activities more severely than others have been sustained. *State v. Hogueiver*, 152 Ind. 652, 53 N. E. 921 (1899); *Tinder v. Clarke Auto Co.*, 238 Ind. 302, 149 N. E. 2d 808 (1958); *State v. Murray*, 104 Neb. 51, 175 N. W. 666 (1919); *Commonwealth v. Grochowiak*, 184 Pa. Super. 522, 136 A. 2d 145 (1957), app. dism'd for want of a substantial federal question, 358 U. S. 47; *Breyer v. State*, 102 Tenn. 103, 50 S. W. 769 (1899). Cf. *Sherman v. Mayor of Paterson*, 82 N. J. L. 345, 82 A. 839 (1912). For cases sustaining state statutes applicable in some, but not all, localities, see *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541 (1896); *Bohl v. State*, 3 Tex. App. 683 (1878); and compare *Sarner v. Township of Union*, 55 N. J. Super. 523, 151 A. 2d 208 (1959), with *Two Guys from Harrison, Inc., v. Furman*, 32 N. J. 199, 160 A. 2d 265 (1960).

bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality.

When these standards are applied, first, to the Maryland statute challenged in the *McGowan* case, appellants' claims under the Due Process and Equal Protection Clauses show themselves clearly untenable. Counsel contend that the Sunday sales prohibition, Md. Code Ann., 1957, Art. 27, § 521, is rendered arbitrary by its exception of retail sales of tobacco items and soft drinks, ice and ice cream, confectionery, milk, bread, fruit, gasoline products, newspapers and periodicals, and of drugs and medical supplies by apothecaries—by the further exemption in Anne Arundel County, under § 509, of certain recreational activities and sales incidental to them—and by the permissibility under other state and local regulations of various amusements and public entertainments on Sunday, Sunday beer and liquor sales, and Sunday pinball machines and bingo. The short answer is that these kinds of commodity exceptions, and most of these exceptions for amusements and entertainments, can be found in the comprehensive Sunday statutes of England, Puerto Rico, a dozen American States, and many other countries having uniform-day-of-rest legislation.<sup>136</sup> Surely unreason cannot be so widespread. The notion that, with these matters excepted, the Maryland statute lacks all rational foundation is baseless. The exceptions relate to products and services which a legislature could reasonably find necessary to the physical and mental health of the people or to their recreation and relaxation

<sup>136</sup> See note 131, *supra*; Appendix II to this opinion: Weekly Rest in Commerce and Offices, Report VII (1), International Labour Conference, 39th Sess., Geneva, 1956 (1955), 27-52; Weekly Rest in Commerce and Offices, Report A, International Labour Conference, 26th Sess., Geneva, 1940 (1939), 82-127.

on a day of repose. Other sales activity and, under Art. 27, § 492, all other labor, is forbidden. That more or fewer activities than fall within the exceptions could with equal rationality have been excluded from the general ban does not make irrational the selection which has actually been made. There is presented in this record not a trace of evidence as to the habits and customs of the population of Maryland or of Anne Arundel County; nothing that suggests that the pattern of legislation which their representatives have devised is not reasonably related to local circumstances determining their ways of life. Appellants have wholly failed to meet their burden of proof.

Counsel for McGowan urge that the allowance, limited to Anne Arundel County, of retail sales of merchandise customarily sold at bathing beaches, bathhouses, amusement parks and dancing saloons, violates the equal protection of the laws both by discriminating between Anne Arundel retailers and those in other counties, and by discriminating among classes of persons within Anne Arundel County who compete in sales of the same articles.<sup>137</sup> Clearly appellants, who were convicted for selling within the county, would not ordinarily have standing to raise the issue of possible discrimination against out-of-county merchants; in any event, on this record, it is dubious that the contention was adequately raised below. Suffice to say, for purposes of the due process issue which appellants did raise, that the provision of different Sunday regulations for different regions of a State is not *ipso facto* arbi-

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<sup>137</sup> It is unclear whether the exception here assailed permits the sale of merchandise essential to, or customarily sold at bathing beaches, bathhouses, etc., *only* at those enumerated places or by all retailers within the county. Since the Maryland Court of Appeals left this question of construction open below, I assume the interpretation most favorable to appellants' claim.

trary. See *Salsburg v. Maryland*, 346 U. S. 545; *Missouri v. Lewis*, 101 U. S. 22, 31.

As for the asserted discrimination in favor of those who sell at the beach or the park articles not permitted to be sold elsewhere, the answer must be that between such beach-side enterprisers and the general suburban merchandising store at which appellants are employed there is a reasonable line of demarcation. The reason of the exemption dictates the human logic of its scope. The legislature has found it desirable that persons seeking certain forms of recreation on Sunday have the convenience of purchasing on that day items which add enjoyment to the recreation and which, perhaps, could not or would not be provided for by a vacationer prior to the day of his Sunday outing. On the other hand, the policy of securing to the maximum possible number of distributive employees their Sunday off might reasonably preclude allowing every retail establishment in the county to open to serve this convenience. A tenable resolution, surely, is to permit these particular sales only on the premises where the items will be needed and used. The enforcement problem which could arise from permitting general merchandising outlets to open for the sale of these items alone, but not for the sale of thousands of other items at adjacent counters and shelves, might in itself justify the limitation of the exception to the group of on-the-premises merchants who are less likely to stock

Many of the jurisdictions which have Sunday laws provide some form of local option procedure for the creation of exceptions. This is only to recognize the obvious fact that conditions of limited geographical range may be determinative in striking the balance of forbidden and permissible Sunday activity which best accords with popular habits and desires. In Maryland the State Legislature itself does the job of adapting the general state-wide law to local circumstances. This difference in method can scarcely entail different federal constitutional consequences.



articles extraneous to the use of the enumerated amusement facilities.

The Massachusetts statute attacked in the *Gallagher* case contains a wider range of exceptions but, again, none that this record shows to be patently baseless and therefore constitutionally impermissible. The court below believed that reason was offended by such provisions as those which allow, apparently, digging for clams but not dredging for oysters, or which permit certain professional sports during the hours from 1:30 to 6:30 p. m. while restricting their amateur counterparts to 2 to 6, or which make lawful (as the court below read the statute) Sunday pushcart vending by conscientious Sabbatarians, but not Sunday vending within a building. But the record below, on the basis of which a federal court has been asked to enjoin the enforcement of a state statute, contains no evidence concerning clam-digging or oyster-dredging, nothing to indicate that these two activities have anything more in common—requiring similar treatment—than that in each there is involved the pursuit of mollusca. There is nothing in the record concerning professional or amateur athletic events, and certainly nothing to support the conclusion that the problem of Sunday regulation of pushcarts is so similar to the problem of Sunday regulation of indoor markets as to require uniform treatment for both.<sup>139</sup> These various differently treated situations may be different in fact, or they may not. A statute is not to be struck down on supposition.

It is true, as appellees claim, that Crown Kosher Super Market may not sell on Sunday products which other retail establishments may sell on that day; bread (which may be sold during certain hours by innkeepers, common victuallers, confectioners and fruiterers, and, along with

<sup>139</sup> See *Eldorado Ice Cream Co. v. Clark*, [1938] 1 K. B. 715, holding the sale of ice cream from a box tricycle without the prohibition of the Shops (Sunday Trading Restriction) Act.

other bakery products, by bakers), confectionery, frozen desserts and dessert mix, and soda water (which may be sold by innkeepers, common victuallers, confectioners and fruiterers, and druggists), tobacco (which may be sold by innkeepers, common victuallers, druggists, and regular newsdealers), etc. (The sale of drugs and newspapers on Sunday is permitted generally.) But although Crown Koshier undoubtedly suffers an element of competitive disadvantage from these provisions, the provisions themselves are not irrational. Their purpose, apparently, is to permit dealers specializing in certain products whose distribution on Sunday is regarded as necessary, to sell those products and also such other among the same group of necessities as are generally found sold together with the products in which they specialize, thus fostering the maximum dissemination of the permitted products with the minimum number of retail employees required to work to disseminate them. Shops such as newsdealers, druggists, and confectioners may in Massachusetts tend, for all we know, to be smaller, less noisy, more widely distributed so that access to them from residential areas entails less traveling, than is the case with other stores. They may tend to hire fewer employees. They may present, because they specialize in products whose sale is permitted, less of a policing problem than would general markets selling these and many other products.<sup>112</sup> Again there is nothing in the record to support the conclusion that Massachusetts has failed to afford to the Crown Koshier Super Market treatment which is equivalent to that enjoyed by all other retailers of a class not rationally

<sup>112</sup> Consider the alternative suggested by the ordinance sustained in *In re Sumida*, 177 Cal. 388, 170 P. 823 (1918), requiring that where an establishment housing both permitted and prohibited businesses remains open on Sunday for transaction of the former, a five-foot-high permanent partition or screen must be erected to separate the two business areas.

distinguishable from *Crown*. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here." *Williamson v. Lee Optical, Inc.*, 348 U. S. 483, 489.

Nor, on the record of the *McGinley* case, can any other conclusion be reached as to the 1959 Pennsylvania Sunday retail sales act. Appellants in this case argue that to punish by a fine of up to one hundred dollars per sale—or two hundred dollars per sale within one year after the first offense—the retail selling of some twenty enumerated broad categories of commodities, while punishing all other sales and laboring activity by the four-dollars-per-Sunday fine fixed by the earlier Lord's day statute,<sup>141</sup> is arbitrary and violative of equal protection. But the court below found, and in this it is supported by the legislative history of the 1959 act,<sup>142</sup> that the enactment providing severer penalties for these classes of sales was responsive to the appearance in the Commonwealth, only shortly before the act's passage, of a new kind of large-scale mercantile enterprise which, absorbing without difficulty a four-dollar-a-week fine, made a profitable business of persistent violation of the earlier statute. These new enterprises may have attracted a disturbing volume of Sunday traffic; they may have employed more retail salesmen, and under different conditions, than other kinds of businesses in the State; some of the legislators, apparently, so believed.<sup>143</sup> The danger may have been apprehended that not only would these violations of long-standing State legislation continue, but that competition would force open other enterprises which had for years closed on Sunday. Under this threat the 1959 statute was designed.

<sup>141</sup> See *Friedeborn v. Commonwealth*, 113 Pa. 242, 6 A. 160 (1886).

<sup>142</sup> See 36 Pennsylvania Legislative Journal, 143d General Assembly (1959), 1139.

<sup>143</sup> See *id.*, at 1142-1143, 2568.

It applies not only to the new merchandisers—if that were so, quite obviously, different constitutional problems would arise. Rather it singles out the area where a danger has been made most evident, and within that area treats all business enterprises equally. That in so doing it may have drawn the line between the sale of a sofa cover, punished by a hundred dollar fine, and the sale of an automobile seat cover, punished by a four dollar fine, is no sufficient to void the legislation. “[A] State may classify with reference to the evil to be prevented, and . . . if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named.” Mr. Justice Holmes, in *Patsone v. Pennsylvania*, 232 U. S. 138, 144.

Even less should a legislature be required to hew the line of logical exactness where the statutory distinction challenged is merely one which sets apart offenses subject to penalties of differing degrees of severity, not one which divides the lawful from the unlawful. “Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience. . . .

Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly mat-

ters of time and place. They are thus matters within legislative competence." *Tigner v. Texas*, 310 U. S. 141, 148, 149. Appellants in *McGinley*, like appellants in the *McGowan* and appellees in the *Gallagher* cases have had full opportunity to demonstrate the arbitrariness of the statute which they challenge. On this record they have entirely failed to satisfy the burden which they carry. *Friedman v. New York*, 341 U. S. 907; *McGee v. North Carolina*, 346 U. S. 802; *Towery v. North Carolina*, 347 U. S. 925. Cf. *Missouri, K. & T. R. Co. v. Cade*, 233 U. S. 642.

The *Braunfeld* case, however, comes here in a different posture. Appellants, plaintiffs below, allege in their amended complaint that the 1959 Pennsylvania Sunday retail sales act is irrational and arbitrary. The three-judge court dismissed the amended complaint for failure to state a claim. Speaking for myself alone and not for MR. JUSTICE HARLAN on this point, I think that this was too summary a disposition. However difficult it may be for appellants to prove what they allege, they must be given an opportunity to do so if they choose to avail themselves of it, in view of the Court's decisions in this series of cases. I would remand No. 67 to the District Court.

## APPENDIX I.

### PRINCIPAL COLONIAL SUNDAY STATUTES AND THEIR CONTINUATION UNTIL THE END OF THE EIGHTEENTH CENTURY.

#### CONNECTICUT:

##### *New Haven Colony:*

1656: Prophanation of the Lord's Day, New Haven's Settling in New England. And Some Laws for Government (1656), reprinted in Hinman, *The Blue Laws* (1838), 132, 206.

See also Prince, *An Examination of Peters's "Blue Laws,"* H. R. Doc. No. 295, 55th Cong., 3d Sess. 95, 109, 113-114, 123-125.

##### *Connecticut Colony:*

1668: 2 Public Records of the Colony of Connecticut, 1665-1678 (1852), 88 (traveling, playing).

1672: Prophanation of the Sabbath, Laws of Connecticut, 1673 (Brinley reprint 1865), 58.

1676: 2 Public Records of the Colony of Connecticut, 1665-1678 (1852), 280.

See *An Act for the due Observation, and keeping the Sabbath, or Lord's Day; and for Preventing, and Punishing Disorders, and Prophaneness on the same, Acts and Laws of His Majesty's English Colony of Connecticut in New-England* (1750), 139; *An Act for the due Observation of the Sabbath or Lord's-Day, Acts and Laws of the State of Connecticut* (1784), 213; *An Act for the due Observation of the Sabbath or Lord's-Day, Acts and Laws of the State of Connecticut* (1796), 368.

#### DELAWARE:

1740: *An Act to prevent the Breach of the Lord's Day commonly called Sunday, Laws of the Government of*



New-Castle, Kent and Sussex Upon Delaware (1741), 121.

1795: An Act more effectually to prevent the profanation of the Lord's day, commonly called Sunday, 2 Laws of Delaware, 1700-1797 (1797), 1209.

#### GEORGIA:

1762: An Act For preventing and punishing Vice, Profaneness, and Immorality, and for keeping holy the Lord's Day, commonly called Sunday, Acts Passed by the General Assembly of Georgia, 1761-1762 (ca. 1763), 10.

See Marbury and Crawford, Digest of the Laws of Georgia, 1755-1800 (1802), 410.

#### MARYLAND:

1549: An Act concerning Religion, 1 Archives of Maryland (Proceedings and Acts of the General Assembly), 1637/8-1664 (1883), 244.

1654: Concerning the Sabbath Day, *id.*, at 343.

1674: An Act against the Prophaning of the Sabbath day, 2 Archives of Maryland (Proceedings and Acts of the General Assembly), 1666-1676 (1884), 414 (inn-keepers).

1692: An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province, 13 Archives of Maryland (Proceedings and Acts of the General Assembly), 1684-1692 (1894), 425.

1696: An Act for Sanctifying & keeping holy the Lord's Day Comonly called Sunday, 19 Archives of Maryland (Proceedings and Acts of the General Assembly), 1693-1697 (1899), 418.

1723: An Act to punish Blasphemers, Swearers, Drunkards, and Sabbath-Breakers . . . . Bacon, Laws of Maryland (1765), Sf2.

See 1 Dorsey, General Public Statutory Law of Maryland, 1692-1839 (1840), 65.

MASSACHUSETTS:

*Plymouth Colony:*

1650: Prophanacon the Lord's Day, Compact with the Charter and Laws of the Colony of New Plymouth (1836), 92.

1658: *Id.*, at 113 (traveling).

1671: General Laws of New Plimouth, c. III, §§ 9, 10 (1672), in *id.*, at 247.

*Massachusetts Bay Colony:*

1653: Sabbath, Colonial Laws of Massachusetts (reprinted from the edition of 1672 with the supplements through 1686) (1887), 132 (traveling, sporting, drinking).

1668: For the better Prevention of the Breach of the Sabbath, *id.*, at 134.

1692: An Act for the better Observation and Keeping the Lord's Day, Acts and Laws of His Majesty's Province of the Massachusetts-Bay in New-England, in Charter of the Province of the Massachusetts-Bay in New-England (1759 [*sic*]), 13.

1761: An Act for Repealing the several Laws now in Force which relate to the Observation of the Lord's Day, and for making more effectual Provision for the due Observation thereof, *id.*, at 392.

1782: An Act for Making More Effectual Provision for the Due Observation of the Lord's Day . . . . Acts and Laws of Massachusetts, 1782 (reprinted 1890), 63.

1792: An Act providing for the due Observation of the Lord's Day, 2 Laws of Massachusetts, 1780-1800 (1801), 536.

See also the act of 1629 set forth in Blakely, American State Papers on Freedom in Religion (4th rev. ed. 1949), at 29-30...

#### NEW HAMPSHIRE:

1700: An Act for the better Observation and Keeping the Lords Day, Acts and Laws Passed by the General Court of His Majesties Province of New-Hampshire in New-England, 1726 (reprinted 1886), 7.

1715: An Act for the Inspecting, and Supressing of Disorders in Licensed Houses, *id.*, at 57 (innkeepers).

1785: An Act for the Better Observation and Keeping the Lords Day, 5 Laws of New Hampshire (First Constitutional Period), 1784-1792 (1916), 75.

1789: An Act for the better Observation of the Lord's day . . . . *id.*, at 372.

✓ 1790: An Act for the better observation of the Lords day . . . . 6 Laws of New Hampshire (Second Constitutional Period), 1792-1801 (1917), 592.

#### NEW JERSEY:

1675: Leaming and Spicer, Grants, Confessions and Original Constitutions of the Province of New-Jersey with the Acts Passed during the Proprietary Governments (ca. 1752), 98.

1683: Against prophaning the Lord's Day, *id.*, at 245.

1693: An Act for preventing Profanation of the Lords Day, *id.*, at 519.

1704: An Act for Suppressing of Immorality. 1 Nevill. Acts of the General Assembly of the Province of New-Jersey, 1703-1752 (1752), 3.

1790: An Act to promote the Interest of Religion and Morality, and for suppressing of Vice . . . Acts of the Fourteenth General Assembly of the State of New Jersey, c. 311 (1790), 619.

1798: An Act for suppressing vice and immorality. Laws of New Jersey, Revised and Published under the Authority of the Legislature (1800), 329.

#### NEW YORK:

1685: A Bill against Sabbath breaking. 1 Colonial Laws of New York, 1664-1775 (1894), 173.

1695: An Act against profanation of the Lords Day, called sunday, *id.*, at 356.

1788: An Act for suppressing immorality. Laws of New York, 1785-1788 (1886), 679.

#### NORTH CAROLINA:

1741: An Act for the better observation and keeping of the Lord's day, commonly called Sunday; and for the more effectual suppression of vice and immorality. 1 Laws of North Carolina (1821), 142.

#### PENNSYLVANIA:

1682: The Great Law or The Body of Laws, in Charter and Laws of the Province of Pennsylvania, 1682-1700 (with the Duke of York's Book of Laws, 1676-1682) (1879), 107.

1690: The Law Concerning Liberty of Conscience (A Petition of Right, First Law), *id.*, at 192.

1700: The Law Concerning Liberty of Conscience, 2 Statutes at Large of Pennsylvania (1896), 3.

1705: An Act to Restrain People from Labor on the First Day of the Week, *id.*, at 175.

1779: An Act for the Suppression of Vice and Immorality, 9 Statutes at Large of Pennsylvania (1903), 333.

1786: An Act for the Prevention of Vice and Immorality . . . 12 Statutes at Large of Pennsylvania (1906), 313.

1794: An Act for the Prevention of Vice and Immorality . . . 15 Statutes at Large of Pennsylvania (1911), 110.

#### RHODE ISLAND:

1673: 2 Records of the Colony of Rhode Island and Providence Plantations, 1664-1677 (1857), 503 (alcoholic beverages).

1679: 3 Records of the Colony of Rhode Island and Providence Plantations, 1678-1706 (1858), 30 (employing servants).

1679: An Act Prohibiting Sports and Labours on the First Day of the Week, Acts and Laws, of His Majesty's Colony of Rhode-Island and Providence-Plantations (1730), 27.

1784: Rhode Islands Acts and Resolves, Aug. 1784 (1784), 9 (excepting members of Sabbatarian societies; but exception does not extend to opening shops, to mechanical work in compact places, etc.).

1798: An Act prohibiting Sports and Labour on the first Day of the Week, Public Laws of Rhode-Island and Providence Plantations (1798), 577.

## SOUTH CAROLINA:

1692: An Act for the better Observance of the Lord's Day, commonly called Sunday, 2 Statutes at Large of South Carolina (1837), 74.

1712: An Act for the better observation of the Lord's Day, commonly called Sunday, *id.*, at 396.

See Grimke, Public Laws of South-Carolina (1790), 19.

## VIRGINIA:

1610: For the Colony in Virginea Britannia, Lawes Divine, Morall and Martiall (1612), in 3 Force, Tracts Relating to the Colonies in North America (1844), II, 10 (gaming).

1629: 1 Hening, Statutes of Virginia (1823), 144.

1642-1643: *Id.*, at 261 (traveling, shooting).

1657: The Sabbath to bee kept holy, *id.*, at 434 (traveling, shooting, lading).

1661-1662: Sundays not to bee profaned, 2 Hening, Statutes of Virginia (1823), 48.

1691: An act for the more effectual suppressing the severall sins and offences of swaring, cursing, profaineing Gods holy name, Sabbath abuseing, drunkenness, fornication, and adultery, 3 Hening, Statutes of Virginia (1823), 71.

1705: An act for the effectual suppression of vice, and restraint and punishment of blasphemous, wicked, and dissolute persons, *id.*, at 358.

1786: An act for punishing disturbers of Religious Worship and Sabbath breakers, 12 Hening, Statutes of Virginia (1823), 336.

In some of the Colonies the English Sunday laws were also in effect. See, e. g., Martin, Collection of the Statutes of England in Force in North-Carolina (1792), 379.



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## APPENDIX II.

This Appendix sets forth the important state legislative provisions prohibiting or regulating private activity on Sunday. In reducing these often complex laws to tabular form, a certain simplification has been required. Provisions in different States which are found in a single category, *e. g.*, "Trade in Alcoholic Beverages," or "Racing," may differ considerably in detail. This Appendix does not include references to: (1) provisions declaring Sunday a holiday or non-business day; (2) provisions closing the courts on Sunday or prohibiting the service of judicial process on that day; (3) provisions giving various government employees Sunday off or excepting Sunday from the days of labor for state prisoners; (4) penalty sections where Sunday laws are parts of general regulatory codes, *e. g.*, fish and game laws; (5) jurisdictional provisions or provisions authorizing arrest and detention on Sunday of offenders against the various Sunday laws, unless these are of special interest; and (6) definition provisions, statutes of limitation of prosecution, and similar ancillary provisions.

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STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR PROHIBITIONS				
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting and
ALABAMA	Ala. Code (1940) (Recomp. 1958)		T. 14, §§ 420, 422	T. 14, § 420	T. 14, § 420 (gaming) T. 14, § 421 (various public sports)	T. 9, § 21 (contracts void)	T. 29, §§ 36, 36 (1) (sale or public consumption)			T. 55, § 346	T. 14, § 4 (shoot)
ALASKA	Alaska Comp. Laws Ann. (1958 Cum. Supp.)										
ARIZONA	Ariz. Rev. Stat. Ann. (1956)										
KANSAS	Ark. Stat. Ann. (1947) (Replacement Vols. 1956 & 1960)				§ 41-3809 (card games)		§ 4-244 (15) (permitted hours) §§ 48-901 (b), 48-904 to 48-906		§ 22-357	§ 5-202	
CALIFORNIA	Codes										
COLORADO	Colo. Rev. Stat. Ann. (1953)						§§ 75-2-3 (3), 75-2-3 (4) (permitted hours)	§§ 13-20-1 to 13-20-3	§§ 40-12-20, 40-12-21 (1st & 2d class cities)	Pen. Code § 413½ § 129-1-16	F. G. Co. (net salm. Sun.)
CONNECTICUT	Conn. Gen. Stat. Rev. (1958)	§ 53-300 ("secular")	§ 53-300	§ 53-300 § 53-302 (permitting industrial or commercial employee to work Sun. unless relieved one day in next six; does not make lawful activity prohibited under § 53-300)	§ 53-300 (sport, presence at concert, dance, public diversion)			§ 53-301	§ 20-246 (& hols.)	§ 19-334 (& hols.)	§ 26-73 (exceptions) on Fairde
DELAWARE	Del. Code Ann. (1953)				T. 28, § 906 (public dance, theater or cinema outside town limits or during hours specified, differing for two classes of cities)		T. 4, § 717 (& hols.)			T. 28, § 151	T. 7, § 714 (exception)
DISTRICT OF COLUMBIA	D.C. Code (1951) Supp. VIII, 1960 D.C. Police Regs. (1955)				Pol. Regs., art. 6, § 4(d) (circus, carnival, etc.); art. 17, § 18 (paid public entertainment, cinema, etc., in place of public amusement)		§ 25-107 (comm'rs may forbid sale)				
FLORIDA	Fla. Stat. Ann. (1943)	§ 855.01 (held unconstitutional as arbitrary in view of exceptions, <i>Kelly v. Blackburn</i> , 95 So. 2d 260; see <i>Henderson v. Antonacci</i> , 62 So. 2d 5)	§ 855.02 Fla. Laws 1959, Special Act, c. 59-1650 (one county)	§ 855.03	§ 855.05 (game, sport)		§ 362.14 (with local option provisions)	§ 320.272 (& hols.) (21 band dealers)			§ 855.04 (b) § 370.11 (s)

## APPENDIX II.

## PROHIBITIONS

## EXCEPTIONS TO GENERAL PROHIBITIONS

Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or Sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs; Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs
T. 14, § 420 (hunt & shoot)	T. 14, § 420	T. 5, § 131 (banks)	(Yes)	(Druggists)	(Newsstands; sale of newspapers)	(R. R., stages, steamboats & vessels)	(Sale of gas & oil; auto repair shops)	(Fruit stands; ice cream shops; ice mfg. plants; sale of ice)		(Lunchstands; restaurants; delicatessens)	
[Excepted commodities may not be sold in connection with prohibited activities]											
	§§ 41-3807, 41-3808 (horse race and cock fight); see § 84-2828 (dog race)										
F. G. Code §§ 864, 865 (net salmon & shad Sat. Sun.)		Ag. Code § 309 (slaughtering Sun. & hols.)									
	§ 129-2-10	§ 27-1-4 (cleaning & dyeing trade—section of comprehensive hours-of-labor provisions)					(Sale of petrol products, tires; auto accessories; repairs; towing, wrecking)				
§ 26-73 (hunt, with exceptions); § 26-282 (clam on Fairfield beach)			(Yes)	§ 53-300 (sale of medical supplies) § 53-302 (druggists)	(Production, distribution & sale of newspapers & periodicals)	§ 16-72 (street R. R. & bus)	(Emergency repair to auto, motor, aircraft, boats, etc., "including" sale of gas, towing & washing, sale of supplies, repair parts)	(Sale of fruit, ice, ice cream, confectionery non-alcoholic beverages)	(Sale of tobacco & smokers' supplies)		(Sale of dairy products, eggs, bakery products)
[Sales exceptions limited to those who sell products on secular days]											
T. 7, § 714 (hunt, with exception)	T. 28, § 906 (outside town limits or during hours specified, differing for two classes of cities)	T. 28, § 906 (public auction outside town limits or during hours specified, differing for two classes of cities) T. 28, § 1139 (bingo)									
		Pol Regs., art. 2, § 1 (street vendors); art. 25, § 14 (a) (labor in building construction or demolition near residential area or place of worship)									
§ 855.04 (hunt & shoot) § 370.11 (shad)	§ 855.05 § 850.04 (with exception)	§ 551.11 (franton)	(Yes)	L. 1959, c. 59-1650 (sale of drugs)	L. 1959, c. 59-1650 (sale of newspapers)		[Exceptions to §§ 855.01, 855.02 omitted] L. 1959, c. 59-1650 (sale of heating fuel, gas)	L. 1959, c. 59-1650 (sale of ice)		L. 1959, c. 59-1650 (sale of meals)	

EXCEPTION FOR OBSERVERS OF OTHER DAYS			MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
Entertainments	Operation of Man- ufacturing Pro- cesses Requiring Constant Operation	Miscellaneous	Regulation of Sunday Business	Suppression of Sabbath Desecra- tion	
(Local option provisions for two classes of cities: cinema, cinema-vaudeville)	Yes	(Communications; public utilities; florists)			T. 26, § 344 (children)
					§ 43-2, 112 (children)
§ 19-2336, 41-3805 (cinema cannot be banned locally)			§ 19-2335		§ 23-29 (women)
					§ 81-706, 81-707 (children) § 81-601 (women, unless paid overtime)
					Lab. Code §§ 551 to 556 Lab. Code § 851 (12 days in 14 pharmacists)
					Indust. Comm'n Orders Nos. 10, 13 (1956), CCH Lab. Law Rep., State Laws (1960), pp. 52,756, 52,758 (women & children in specified occupa.)
§ 7-164 (local option in- door concerts 2-6 p.m. — classical music only) § 7-165 (local option cin- ema 1-11:30 p.m.) § 7-156 (local option theater & vaudeville 2-11 p.m.)	§ 43-392	§ 53-300 (Sale of fresh agricultural & horticultural products, antiques) § 53-302 (farm & personal services, watchmen, janitors & superintendents, transportation, sale & delivery of newspapers, milk & food; necessary repairs)	§ 53-303 (conscien- tious observer of 7th day or Jewish Sabbath who disturbs no other person at public worship not subject to penalty for laboring if notice of belief filed)		§ 31-13, 31-18 (women & children in specified occupa.)
(Cinema outside towns during specified hours, adjoining for two and a third named counties)			T. 28, § 906 (in effect, any "worldly activity" not to conflict with State prohibitions)		T. 19, § 515 (children) T. 19, § 302 (women in specified occupa.)
Pol. Regs., art. 6, § 43 (ch- airs, etc. 2-11 p.m.); art. 17, § 18 (public entertainment, etc., before 3 a.m. & after 1 p.m.)					§ 36-202 (children) § 35-301 (women in specified occupa.) § 2-1114 (barber, one-day closing)
	§ 855.07				
L. 1959, c. 59, § 1659 (theater)			See L. 1959, c. 59, § 1659		§ 430.081(1) (children)



STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR			
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling
GEORGIA	Ga. Code Ann. (1936)	§ 26-6905 (business or work of "ordinary calling")			§ 26-6914 (public dancing) See also Ga. Laws 1906, No. 356 (amusements in certain non-urban areas without neighbors' approval)	§ 14-1816 (Sunday only religious holiday) § 26-6903 (R. R. except mail, passenger, perishables, livestock, etc.)	§ 26-6105, 58-738, 58-925, 58-1060, 58-1079 (sale & purchase)			
HAWAII	Hawaii Rev. Laws (1955)				§ 144-33 (county boards of supervisors may provide for exhibitions of cinema after 12:30 p.m. & theater after 6:30 p.m. under such restrictions as they prescribe)		§ 159-77 (clubs may be licensed)			§ 165-9
IDAHO	Idaho Code Ann. (1947)				§ 18-6203 (dance hall after 1 a.m.; merry-go-round before 1 p.m.; circus, show, concert, saloon, variety hall)	§ 18-6212 (Sun. set aside as day of public rest, no penalty)	§ 23-307, 23-927 (& hois.)			§ 54-413
ILLINOIS	Ill. Rev. Stat. (1959)	C. 38, § 549 (disturbing peace and good order of society by labor)		C. 48, § 87 (unlawful to operate specified establishments Sun. without posting schedule of alternative day off for Sun. employees)	C. 38, § 549 (disturbing peace, etc. by any amusement or diversion)	C. 38, § 550 (disturbing private family)	C. 43, § 129 (with local option provisions)			
INDIANA	Burns' Ind. Stat. Ann. (Replacement Vols. 1948, 1951, 1956)	§ 10-4301 ("common" labor, "usual vocation")			§ 10-4302 (professional games, football)	§ 10-4301 (clothing, quarreling)	§ 12-436 (& hois.), 12-917	§ 10-4305		§ 63-205, 63-216, 63-217
IOWA	Iowa Code Ann. (1949)						§ 123-25, 124-20 (& hois., sale & consumption)			
KANSAS	Kan. Gen. Stat. Ann. (1949) & Supp. (1959)	§ 21-952	§ 21-955	§ 21-952	§ 21-954 (cock fight, card games or other games), § 19-2231 (dance halls)		§ 41-712, 41-2704			
KENTUCKY	Ky. Rev. Stat. (1960)	§ 436-160 (working at "occupation")		§ 436-160			§ 244-290, 244-480 (some local option)			§ 436-160
LOUISIANA	La. Rev. Stat. (1950)		§ 51-191 (stores, shops, saloons & licensed places of public business)				§ 26-89, 26-280, 31-192		§ 51-193	
MAINE	Me. Rev. Stat. (1954)	C. 134, § 38		C. 134, § 38, C. 134, § 43 (innholders cannot entertain other persons than travellers, lodgers)	C. 134, § 38 (sport, game, recreation, presence at dance, public diversion, show, entertainment)	C. 134, § 38 (travelling)	C. 61, § 27 (sale & purchase)	C. 134, § 38 A & mobile homes)		C. 134, §§ 38, 39

## PROHIBITIONS

## EXCEPTIONS TO GENERAL PROHIBITIONS

Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs
§ 26-6906 (hunt); § 26-6907 (shoot); § 26-6908 (fish)	§ 26-6915	§ 26-6910 (bathing in view of road to place of worship)	(Yes)								
	§ 18-6213 (race track except auto 1-4:30 p.m.)	§ 18-6203, 18-1201 (pool, billiard & card room)									
C. 61, § 187 (hunting by nonresidents unless State affords reciprocity)	C. 8, § 378.7		(Yes)			(R. R. & watermen unloading; ferrymen, families removing)					
§ 10-4301, 10-4303 (hunt)			(Yes)		(Persons engaged in publication & distribution of news)	(Travelers & those conveying them; families removing; tollgates, ferrymen)					
	§ 21-954		(& sale of articles of immediate necessity)	§ 21-956 (sale of drugs, medicines)		§ 21-953 (ferrymen)					(See heading "Miscellaneous")
§ 30-160 (hunt)		§ 30-160 (pool or billiards)	(Yes)				(Gas stations)				
	§ 4-151	§ 23-216 (hours for children in street trades)		(Drug stores; apothecaries; sale of anything necessary in sickness)	(Newsdealers; newspaper offices)	(R. R.; boats)	(Watering places, livery stables)	(Sale of ice, soda fountains)		(Hotels; boarding houses; restaurants)	(Bakers; dairies)
[All exemptions contained in § 51:192]											
C. 37, § 76 (hunt); C. 37, § 120 (hunt fox, but digging out fox permitted)	C. 134, §§ 38, 39		(Yes)	(Drug stores)	(Printing & selling Sun newspapers)	(Vehicles; common carriers; cabs; carriages; airplanes)	(Garages; sale of gas)	(See heading "Drug Stores")		(Hotels; restaurants)	(See heading "Miscellaneous")

					EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Man- ufacturing Pro- cesses Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecra- tion	
	Sia. Laws 1941, No. 113 (outdoor entertainments & sports 1-6 p.m. in cities above specified population; §§ 26-6915 to 26-6920 (local option athletics)	§ 26-6916 (local option cin- ema; if authorized to oper- ate, cinema must show one religious or educational film per month)		§ 5-644 (perishable farm produce & seed & growing plants)				
		[See heading "General Pro- hibitions, Public Entertain- ment"]						§ 88-22 (children)
					C. 38, § 549 (section shall not be construed to pre- vent due exercise of rights of conscience by person keeping another day as Sabbath)			C. 48, § 21-3 (children) C. 48, §§ 8a-8c (employees in specified occupa- tions; excepts employees working less than 3 hours Sun.)
	(Baseball & ice hockey after 1 p.m. more than 1000' from place of worship or hospital)				§ 10-430 (conscientious observer of seventh day)			§ 28-521 (children)
(See heading "Miscellaneous")				§ 21-956 (sale of provisions)	§ 21-953 (§ 21-952 pen- alties not applicable to member of religious society observing an- other Sabbath)		§§ 14-417, 15-422, 13-430, & theater)	Lab. Dep't Orders Nos. 2, 3, 5 (1936), CCH Lab. Law Rep., State Laws (1960) pp. 54, 328, 54, 329, 54, 330 (women & children in specified occups.)
	(Amateur sports; athletics)	(Cinema & opera)		(Public services or public utilities)	§ 436-100 (member of religious society observ- ing another day)			§ 339-260 (children) § 237-050(1) (overtime for 7th day's employ- ment)
(Bakers; dairies)		(Theaters; any place of amusement not serving alcohol; parks; resorts for recreation & health)		(Bookstores; printing offices; undertakers; c markets; freight ware- houses; telegraph; sale of burial items)		§ 33-4783 (two classes of cities by population may regulate (1) meat markets & bakers; (2) same & sale & delivery of bakery prods.)	§ 33-401 (7)	§ 23-211 (children) § 23-332 (women in specified occupa- tions)
192 (See heading "Miscellaneous")	C. 134, § 39 (outdoor amateur sports & games with exceptions 1-7 p.m., at local option; locality can restrict area to avoid dis- turbance to worshippers) C. 434, § 40 (local option bowling, 2-11 p.m.)	(Concerts; theaters; scientific, philosophical, religious, educational lectures) C. 134, § 41 (cinema 3-11:30 p.m. at local option, but cinema employees may not be employed more than 6-day week)		Grocery	C. 134, § 44 (conscien- tious observer of Sat. as Sabbath not disturbing others)			C. 38, § 24 (children)



STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR P.			
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling
MARYLAND	Md. Code Ann. (1953)	Art. 27, § 492	Art. 27, § 521	Art. 27, § 492	Art. 27, § 522 (keeping dancing saloons, opera, ball or bowling alley)	Art. 27, § 492 (permit child or servant to profane day by gaming)	Art. 25, §§ 90 to 106 (provisions of local application banning sales with various exceptions differing as to hours, geographic scope, sales permitted, establishments which may sell)		Art. 27, § 522	
MASSACHUSETTS	Mass. Gen. Laws Ann. (1958)	C. 136, § 5	C. 136, § 5 C. 136, § 12 (innholders cannot entertain other persons than travellers, lodgers)	C. 149, § 47 (compelling unwilling employee to work Sun. in certain industries & establishments unless he is relieved one day in next six) C. 149, § 48 (unlawful to operate mechanical, mercantile or manufacturing establishments Sun. without posting schedule of alternative day off for Sun. employees); See C. 149, § 51	C. 136, § 2 (presence at or participation in play, sport, game, public diversion) C. 136, § 3 (maintaining public entertainment)	C. 136, § 14 (indecent behavior in places of worship) C. 296, §§ 113, 117 (more severe penalties for certain trespasses to property on Sun.)	C. 138, §§ 12, 33 (blanket & hour prohibitions, some local option)			C. 136, §§ 2, 3, 25, 32
MICHIGAN	Mich. Stat. Ann. (Rev. Vols. 1919, 1952, 1957, 1959, 1960)	§ 18.851	§ 18.851 § 18.852 (keepers of entertainment houses & taverns cannot entertain other persons than travellers, lodgers)		§§ 18.851, 18.854 (presence or participation at dance, game, sport, play, public show, diversion, entertainment or public assembly other than meetings for worship or moral instruction or concerts of sacred music; § 18.854 applies Sun. evening)			§§ 9.2701, 9.2702 (counties over specified population)	§§ 18.121, 18.122	§ 18.422(10)
MINNESOTA	Minn. Stat. Ann. (1947)	§ 614.29 (trades, manufacturers, mechanical employments)	§ 614.29 (sale of raw meat, groceries, clothing, shoes not within "necessity" exception)		§ 614.29 (gaming, shows) § 617.51 (public dancing before noon, local ordinance may ban thereafter)	§ 614.29 (noises disturbing peace)	§ 340.14, Subd. 1	§ 198.275	§ 614.29 (not "necessity"); § 154.16 (license revocation)	§ 341.07 (& certain holidays)
MISSISSIPPI	Miss. Code Ann. (1942 Revamp. 1956)	§ 2308 (labor at trade, calling, business)	§ 2309	§ 2308	§ 2370 (various exhibitions, bear-baiting, etc.)					§ 8924
MISSOURI	Vernon's Mo. Stat. Ann. (1953)	§ 563.090	§ 563.729	§ 563.090	§ 563.710 (cockfights, cards, games)		§ 311.480. See § 311.296 (certain local option provisions for sale before 1:30 a.m.)			

## PROHIBITIONS

## EXCEPTIONS TO GENERAL PROHIBITIONS

Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels
Art. 66C, § 132(d) (hunt) Art. 66C, § 698(d) (take oysters)		Art. 27, § 252(c) (bingo in Baltimore County)	Art. 27, § 492	(Apothecaries may sell drugs, medicines, patent medicines)	(Sale of newspapers, periodicals)		(Retail sale of gasoline, oil, greases)	(Retail sale of candy, soda, soft drinks, ice cream, ices, confectionery, fruits)	(Retail sale of tobacco, cigars, cigarettes)	
C. 131, § 58 (hunt birds or mammals; but trapping permitted); C. 136, § 17 (shoot, with exceptions; hunt, net, spear or commercial fishing, with exceptions)	C. 136, §§ 2, 3, 25, 32	C. 140, § 177A (pinball, license revocation); C. 136, § 18 (innholders letting gaming apparatus)	(Yes) C. 136, § 9 (provision permitting police authorization of work which cannot be done on another day without hardship)	C. 136, § 6 (retail sale of drugs & medicines, articles on physician's prescription, mechanical appliances used by physicians or surgeons)	C. 136, § 6 (preparation, printing, publication, sale, delivery of newspapers)	C. 136, § 6 (various provisions permitting different categories of trucking at different hours, transporting perishables, produce to fairs, etc.; operation of motor vehicles, letting of horses, carriages, boats, motor vehicles, bicycles, running steam ferries on established routes; street R. R., steamboats & R. R.)	C. 136, § 6 (sale of gasoline for use, retail sale of accessories for immediate necessary use in connection with motor vehicles, boats & aircraft, emergency repairs & towing of disabled motor vehicles, wholesale or retail sale of fuel)	C. 136, §§ 6, 7 (delivery of frozen desserts & dessert mix; wholesale or retail sale of ice; various classes of enterprise, some at local option; specified dealers may sell at retail frozen dessert, frozen dessert mix, soda water, confectionery; in some enterprises, fruit)	C. 136, § 6 (specified dealers may sell tobacco at retail)	C. 136, § 6 (sales of meals by innholders & common victualers for off-premises consumption)
		§ 19, 597 (pawnbroker) § 18, 531 (pool & billiard halls outside cities)	(Yes)							
	§ 614.29 (except county fairs)	§ 221.191 (trucks within 35 miles of city in summer; Sun. & hols.)	(In orderly manner so as not to disturb repose & religious liberty)	(Sale of drugs, medicines, surgical appliances)	(Sale of newspapers)			(Fruits, confectionery)	(Sale of prepared tobacco)	(Meals served on or off premises by caterers)
§ 2371 (hunt with dog or gun; fish)	§ 2370		(Yes)	(Druggists may sell medicines)	(Sale of newspapers)	(R. R.; steamboat, common or contract truck transport, street R. R.)	(Livery stable, garage, gas station)	(Ice house)		
§ 563.690 (hunt, shoot)	§ 563.710		(Sale of articles of immediate necessity)	§ 563.730 (sale of drugs, medicines)		§ 563.700 (ferrying)				

{All excepted commodities must be sold in quiet, orderly manner}

					EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Man- ufacturing Pro- cesses Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecra- tion	
(Retail sale of milk, bread)	Art. 27, §§ 493 to 531C (various provisions of local applica- tion, permitting enumerated sports, cinema, theater, amusement parks, swimming pools, beaches, dancing, music, etc., in areas of differing dimension, with differing hours of permitted activity, differing penalties, differing conditions upon permissibility, including minimum distance from places of worship, etc.)			Art. 27, § 509 (sale of mer- chandise customarily sold at beach, amusement parks, etc., in one county) (1950 amendment to Art. 27, § 521 permits sale in same county of various specified food & toilet articles, ornaments, auto & boat accessories, etc., at retail; and keeping open retail shops not em- ploying more than one employee)				Art. 100, § 26 (children)
C. 136, § 6 (permitted house specified dealer may sell bread at retail; bakers may sell bread & bakery products during same hours; milk may be sold & delivered all day, wholesale or retail; making butter & cheese permitted)	C. 136, §§ 21 to 25, 26 to 32 (two sets of local option provisions for amateur & professional athletes with differing permitted hours activities to be more than 1,000' from place of worship (with exception); non- contest outdoor exercises permitted) C. 136, § 415 (local option bowling 1-11 p.m.) C. 136, § 2 (golf, tennis; cer- tain dancing; after 1 p.m., lawn bowling, miniature golf & golf driving range) C. 136, § 17 (local option skeet, trap & target shooting)	C. 136, § 4 (public enter- tainment in keeping with character of day and not inconsistent with its due observance may be locally licensed after 1 p.m.) C. 136, § 4A (bowling alleys, certain shooting galleries, photo galleries, & games at amusement parks & beaches in keeping with character of day, etc., may be locally licensed after 1 p.m.) C. 136, §§ 10, 11 (certain parades with music not within 200' of place of worship) C. 136, § 5 (unpaid work on pleasure boats; letting on trains of outdoor recrea- tional or sports accessories) C. 136, § 2 (concert of sacred music; licensed free open air concert)		C. 136, § 6 (tel. & tel., water, steam, gas, electricity, etc., certain chemical distribu- tion; wholesale handling & delivery of fish & perish- able foods; sale of live bait, of poultry before certain holidays, of certain goods before noon on specified Jewish holidays, catalogues & art works at certain art exhibits; non- commercial photography; nonpublic trade expositions 1-10 p.m.; sale of fruits and vegetables by person raising same; bootblackening before 11 a.m. (local op- tion); digging clams; dressing fish, cultivating land and transporting produce in wartime; unpaid quiet work in private gardens; public baths)	C. 136, § 6 (secular business by conscien- tious observer of Sat. not disturbing others; sale of kosher meat 6-10 a.m. by dealer closing Sat. for reasons of conscience)			C. 149, § 67 (children in specified occupa- tions) C. 149, §§ 47 to 51 (enumerated industries and occupations) (see heading "General Prohibi- tions: Permitting child or servant to work or labor") C. 150, § 184 (2 days off per month, specified R.R. employees)
					§§ 18,855, 18,856-11, 18,122, 9,2702 (con- scientious observer of Sat. or Jewish Sabbath not disturbing others)	§ 5,1740, Ninth (4th class cities)	§ 5,1740, Ninth (4th class cities)	§§ 17,717, 17,718 (children) § 17,261 (motormen)
	(Baseball in orderly manner so as not to disturb repose)			(Shoeshine)				
	§§ 2370, 2370.5 (various specified sports 1-6 p.m.; but local ordinance may ban these, <i>semble</i> )	§§ 2370, 2370.5 (cinema & plays 1-6 p.m.; 9-12 p.m., but local ordinance may ban these, <i>semble</i> )	(Yes)	(Tel. & meat markets in towns of less than spec- ified population; all activi- ties by religious societies which they can otherwise perform)		§ 2368 (can close garages & gas stations during 3 hours) See also § 3374-54	§ 3374-133	
(See heading "Miscellaneous")				§ 563,730 (sale of provisions)	§ 563,700 (member of religious society observ- ing other Sabbath; defense to § 563,500)			§ 294,030 (children)



STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR			
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling
MONTANA	Mont. Rev. Code Ann. (1947)				§ 94-35-216 (dance hall, gambling house, variety hall)		§ 94-35-216 (place of amusement serving alcohol) § 4-114 (State stores)		§ 94-3511	
NEBRASKA	Neb. Rev. Stat. (1943) (Reissued Vols. 1954, 1956, 1958, 1960) & Cum. Supp. (1959)	§ 28-940 ("common" labor)			§ 28-940 (public dancing, baseball)	§ 28-940 (rioting, quarreling)	§ 53-179 (some local option)		§ 28-938	
NEVADA	Nev. Rev. Stat. (1960)				§ 201.260 (noisy sport or amusement disturbing peace of day)					
NEW HAMPSHIRE	N. H. Rev. Stat. Ann. (1955)	§ 578.3 (labor of "secular calling" disturbing others)	§ 578.4	§ 275.32 (working employee at usual occupation unless he receives one day off in next six) § 275.33 (unlawful to operate Sun. without posting schedule of alternative day off for Sun. employees)	§ 578.3 (play, game, sport) § 578.5 (public dancing)	§ 578.6 (rude behavior in place of worship)	§ 181.7 § 176.11 (with exceptions)			§ 578.3, 578.5
NEW JERSEY	N. J. Stat. Ann. (1939-1953)	§ 2A 171-1 ("worldly" employment, no penalty) held impliedly repealed, <i>Two Guns from Harrison, Inc. v. Furman</i> , 32 N.J. 199, 160 A. 2d 265.	§ 2A 171-5.8 to -5.18 (sales or offers to sell of several broad categories of goods, e.g., clothing or wearing apparel, household, business or office appliances. Applies only to counties adopting the statute by referendum)				§ 33-1.45 (local option)	§ 2A 171-1.1	§ 45.4.26. See §§ 40-48-2.1, 40-52-1 (municipalities may regulate barber & beauty shop hours Sun. & hols.)	
NEW MEXICO	N. M. Stat. Ann. (1953)	§ 40-44-2			§ 40-44-2 (sports, cock-fight, public meetings & exhibitions except for religious worship, etc.)	§ 40-44-2 (disturbing worshippers or family)	§ 46-10-14.1			
NEW YORK	McKinney's N. Y. Laws	Pen. Law § 2143 Pen. Law § 2146 (trades, manufactures, agricultural or mechanical employments)	Pen. Law § 2147 (bans all public selling or offering, expressly negates exception for sales of meat & for delicatessens) Pen. Law § 2149 (forfeiture of goods)	Lab. Law § 161 (unlawful to operate Sun. without posting schedule of alternative day off for Sun. employees in specified occupations)	Pen. Law § 2145 (public sports, exercises, shows) Pen. Law § 2152 (theater, concert, cinema, etc., & all public shows, exhibitions, entertainments)	Pen. Law § 2145 (noise disturbing peace of city) Pen. Law § 2151 (parades in cities)	Alco. Bev. §§ 105, 106 (some permitted hours) Pen. Law § 2147		Pen. Law § 2153	Unconsol. § 9105
NORTH CAROLINA	N. C. Gen. Stat. (Recomp. 1953) (Replacement Vols. 1958 & 1960)						§ 18-45(f), 18-45 (State stores)			

## EXCEPTIONS TO GENERAL PROHIBITIONS

[illegible]

					EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Man- ufacturing Pro- cesses Requiring Constant Operation	Miscellaneous.		Regulation of Sunday Business	Suppression of Sabbath Desecra- tion	
		(Free dance in public park)						
	(Local option baseball)	(Certain regulated public dancing)			§ 28-940 (conscientious observer of Sat.)	§ 15-258 (various classes of cities) § 16-226 § 17-128	§ 14-102(24) (various classes of cities) § 15-258 § 16-226 § 17-128	
								§§ 609, 630, 609, 110 (women)
(Sale of milk & bread)	§ 578.5 (local option plays, games, sports & exhibitions; can authorize specified sports, and all sports with admission fee, only after 1 p.m.; cinema, theater, vaudeville only after 2 p.m.)			(Emergency repairs on mills and factories); § 578.5 (local option retail business)				§§ 275.32 to 275.35 (See heading "General Prohibitions Per- mitting child or servant to work or labor")
v. Mayor of Paramus, 32 N.J. 296, 160 A. 2d 941]					§ 2A-171-4 (conscien- tious observer of Sat. who devotes same to religious exercises & does not disturb others; exception does not per- mit selling or showing merchandise)	§§ 40-95-3, 40-95-4 (sea- shore resorts may regu- late passenger carriage & landing by vessel & cer- tain R. R. operation) See other headings.		§ 34-2-21.3 (children) § 34-2-24 (women in specified occupa- tions)
§ 2A-171-6 (local option sale & delivery of milk)	§ 2A-171-6 (recreation, sport, amusement not disturbing others, at local option and subject to local regulation; walk- ing & driving for recreation; letting conveyances for same)			§ 2A-171-2 (preparation & sale of perishable agricul- tural & horticultural prods.)				
§ 40-44-3 (baker)		§ 40-44-3 (cinema)		§ 40-44-3 (certain farm work where necessary, butchers; camp grounds)				
Pen. Law § 2147 (sale of bread, milk, eggs)	Pen. Law § 2145 (private sports, games & activities primarily for enjoyment & recreation of participants, not disturbing repose & religious liberty; local option spectator sports, exercises, shows after 2 p.m.)	Pen. Law § 2152 (local op- tion public entertainment after 2 p.m.) Pen. Law § 2151 (certain processions without music; specified groups may parade with music but not within one block of place of worship; religious society may parade with music after 1 p.m.; local option parades with or without music after 2 p.m.)		Pen. Law § 2147 (food sale, service & delivery before 10 a.m.; sale of flowers, souvenirs; sale of prepared foods by grocers, delicatessen, bakeries, 4-7:30 p.m.; off sales of beer before 3 a.m. and after 1 p.m., other than in cities of specified mini- mum population, delica- tessens, bakeries, farmers markets, farm-produce roadstands, tackle & bait stores can sell usual mer- chandise)	Pen. Law § 2144 (person uniformly keeping another day as holy time, if he does not disturb others keeping Sun. as holy time; defense to § 2143)			Lab. Law §§ 161, 167 (specified occupa- tions) Lab. Law §§ 170 to 185-a (women and chil- dren in specified occupa- tions) Lab. Law § 166 (2 days rest per month; specified R. R. employees) Educ. Law § 6807 (1 day per 2 weeks phar- macists)
						N. C. Laws 1959, c. 633 (one county authorized to prohibit commercial operations near place of worship)		§ 110.2 (children) § 95.17 (6-day week for women, 12 days in 14 for men, with exceptions)



## SPECIAL REGULATIONS OR PROHIBITIONS

State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling
NORTH DAKOTA	N. D. Century Code (1900)	§ 12-21-15 ("servile" labor, trades, manufactures, mechanical employments)	§ 12-21-15		§ 12-21-15 (pub. sports, circuses, carnivals) § 12-21-19 (place for public dancing)					
OHIO	Page's Ohio Rev. Code Ann. (1954)	§ 3773-24 ("common" labor)	§ 3773-24	§ 3773-24	§ 3773-23 (theatrical or dramatic performance, certain shows and exhibitions, baseball & cinema before noon)	§ 3773-24 (keeping law or disorderly house)	§ 4301-22 (some local option 55 to 59 to 60 hours) See § 3773-23		§ 4739-24	
OKLAHOMA	Okla. Stat. Ann. (1951) (Vol. 1952-1958)	T. 21, § 908 ("servile" labor, trades, manufactures, mechanical employment)	T. 21, § 908		T. 21, § 908 (gaming)		Okla. Const., Art. 27, § 6. T. 37, § 213 (permitted hours, but local option may ban)	T. 25, §§ 917 to 919		
OREGON	Ore. Rev. Stat. (1959)								§ 660-210	§ 463-030 & certain holds
PENNSYLVANIA	Purdon's Pa. Stat. Ann. (1945-1957)	T. 18, § 4699-4 ("worldly employment or business")	T. 18, § 4699-10 (selling or offering at retail various categories of merchandise, e.g., clothing or wearing apparel, household business, or office appliances, houseware, hardware, tools, paints, lumber, luggage, jewelry, toys (excluding novelties or souvenirs), etc.)		T. 18, § 4699-4 (game, sports, diversion) T. 4, §§ 36 to 65 (cinema banned before 2 p.m., unless permitted by local option (free religious films on church premises excepted); no employee may work at Sun cinema unless he has had one day off in preceding six, § 60) T. 4, §§ 81 to 91 (baseball & football); and T. 4, §§ 151 to 157 (sports); similar general bans with local option authorized, § 30, § 31)	T. 18, §§ 632, 633 (jurisdictional and forfeiture allocating provisions)	T. 47, § 4-492 T. 47, § 4-406 (some local option as to p.m. hotel sales) T. 4, § 3-304 (state stores)	T. 18, § 4699-9 (trailers)	T. 43, § 559 (barber license revocation) T. 63, § 519 (same for beauty parlor)	T. 4, §§ 1-30, 202
PUERTO RICO	P. R. Laws Ann. (1955-1956)	T. 33, § 2201 (commercial establishments to close and no work to be done therein Sun. & named hols. Also fixes weekday closing hours)				T. 33, § 2202 (in case of disorder in any exempted establishment, officials may close it)			T. 33, § 2204	

PROHIBITIONS

EXCEPTIONS TO GENERAL PROHIBITIONS

Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs	
§ 12-21-15 (shoot)	§ 12-21-15		(Yes)	(Sale of drugs, medicines, surgical appliances)	(Newspaper plants, sale of newspapers, magazines)	(Steam & street R.R. cabs, busses)	(Livery & feed barns, garages, gas stations)	(Ice cream, soda fountain dispensations, fruits, candy, confectionery)	(Sale of tobacco, cigars)	(Sale of food to be eaten on premises)	(Bakeries, sale of milk)	(Local sports 1 p.m. plays not within 5 worship) § 12-21-21 (b) p.m. unless bags (c)
§ 1531.02 (hunt bird or quadruped) § 3773.26 (possess hunting or shooting implements in open air)			(Yes)				(Traveling, incidental services & commodities)					(Recreation, tion) § 3773.26 (b)
T. 21, § 208 (shoot) T. 29, § 228 (net fish commercially Sat. & Sun.)	T. 21, § 908		(& sale of necessities)	(Sale of drugs, medicines, surgical appliances)			T. 21, § 918 (sale of gas, prods, tires, auto accessories, repairs, towing & wrecking)	(Sale of ice) [See headings "Restaurants, etc." "Miscellaneous"]		(Sale of food & drink for consumption on premises)	(Sale of milk, bread)	
	§ 462.120	§ 726.270 (pawnbroker)										
T. 34, § 4311.702 (hunting, with exceptions of trapping & dog trials) T. 30, § 265 (Sun. fishing regulated) T. 30, §§ 118, 136, 153 (net fish Sun. & parts of Sat. in certain areas; Comm'n may except by regulations)	T. 4, § 307(e)	T. 18, § 4651 (pool, billiard hall) T. 63, § 281-28 (pawnbroker) T. 34, § 1311.721 (retriever trials) T. 34, § 1311.719 (training dog on land without owner's consent)	(& delivery of necessities before 9 a.m. and after 5 p.m.)		(Sale of newspapers)	(Ferryman carrying passengers; watermen landing passengers; persons removing with families)				(Serving travellers, sojourners, strangers, in bake-house, lodging houses, inns, other houses of entertainment)	(Delivery of milk before 9 a.m. & after 5 p.m.)	T. 18, § 4656 recreation enumerated similar actual amend. T. 4, § 181 1-7 p.m. T. 30, § 265 to specified lines, hooks, fishing with specified size consent re certain cases [See heading]
			(Permits in cases of necessity)	(Pharmacies)	(Newspaper copy presses, newspaper stands)		(Garages, gas stations, livery stables)	(Confectionery & pastry stores & stands selling candy, ice depots)	(Sale of matches, manufactured tobacco at certain stands)	(Shops selling coffee only as a beverage & refreshments, restaurants, cafes, hotels, inns)	(Milk depots, dairies, pastry stores)	

[Exempted commodities may not be sold in pool or billiard halls, bowling alleys, saloons, gaming places]

				EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
Sports	Entertainments	Operation of Man- ufacturing Pro- cesses Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecra- tion	
(Local option baseball after 1 p.m. played quietly and not within 500' of place of worship) § 12-21-21 (bowling after 1 p.m. unless local option bans it)	§ 12-21-20 (theater & cinema after 1:15 p.m.) § 12-21-22 (bathhouses, beaches, pleasure boats)		(Electric light, gas, heat & power; sale of meat & fish before 10 a.m.; bootblack; tel. & tel.; popcorn stands)	§ 12-21-17 (person keeping another day as holy time not disturbing other person keeping Sun. as holy time; defense to labor)	§ 40-05-03 (food markets may be banned by cities of specified minimum population)		§ 34-07-15 (children) § 34-06-06 (women in specified occupa- tions) Comm'r Ag & Lab. Order No. 6 (1939), CCH Lab. Law Rep., State Laws (1939) p. 57,131 (children)
(Recreation, sports, amusements, entertainment, exhibi- tions, incidental services & commodities) § 3773.26 (trap shooting)			(Publicly owned entertain- ment places; state & other fairs & incidents)	§ 3773.24 (person con- scientiously observing Sat.)			§ 4109.22 (children in specified occupa- tions) § 4107.46, 4107.47 (women)
			(Sale of meat, fish & other food; sale of burial appli- ances)	T. 21, § 909 (person keep- ing another day as holy time, not disturbing other persons keeping Sun. as holy time)			
							§ 654.315 (children) Wage and Hour Comm'n, Orders Nos. 1, 2, 3, 5, 7, 8, 9, 12, 13, 14, 18, CCH Lab. Law Rep., State Laws (1960) pp. 57,554 to 57,558 (various day-of-rest & 7th-day overtime provisions for women & children in specified occupa- tions) Orders 8, 9 & 12 fix Sun. as established day of rest unless another is scheduled
T. 18, § 4699.4 ("wholesome recreation"; various enumerated sports and similar healthful & recrea- tional activities) (1959 amend.) T. 4, §§ 181 to 185 (tennis 1-7 p.m.) T. 30, § 265 (line fishing up to specified number of lines, hooks, etc; bait net fishing with net below specified size; landowner's consent required in certain cases)	T. 4, §§ 121 to 127 (licensed public concerts after noon; music must be of high order, and enterprise nonprofit; penalty for presenting other entertainment than music at licensed concert)		T. 18, § 4699.4 (public utilities) (1959 amend.) T. 51, § 623 (veteran association band)			T. 43, §§ 23130, 37403 (24 cities of two classes)	T. 43, § 46 (children) T. 43, § 103(a) (women) T. 43, §§ 361,481 (specified occupations)
[See heading: "General Prohibitions: Public Entertain- ment"]							
	(Theaters, racetracks & places of amusement; casinos; billiard rooms)		(Printers, public utilities; public markets selling local produce; stands selling flash- lights, batteries, bulbs, fuses; slaughterhouses; meat stands; docks; undertakers; airport & hotel shops)				T. 29, § 255 (employees of commercial and industrial establishments not subject to T. 33, § 220), penalty: double wages; see also T. 29, § 273



[illegible]

## OR PROHIBITIONS

## EXCEPTIONS TO GENERAL PROHIBITIONS

Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs
	§ 41-6-1	§ 19-26-16 (pawnbroker) § 5-16-5 (public laundries, dry cleaning & pick-up, Sun. & night in cities of specified minimum population)	(Yes) § 25-1-6 (permits in cases of necessity)	§ 5-23-2 (local option retail sale of prescriptions, patent medicines, drugs, hospital supplies)	§ 5-23-2 (local option retail sale of newspapers & periodicals); see § 5-23-5 (delivery of newspapers)		§ 5-23-3 (sale of gas, oil, grease, auto parts; auto service & accessories)	§ 5-23-2 (local option retail sale of fruit, ice cream, confectionery, soda & mineral waters, non-alcoholic tonics & drinks); see § 5-23-5 (delivery of ice)	§ 5-23-2 (local option retail sale of tobacco & smokers' supplies)		§ 5-23-2 (local option retail sale of milk, bakery products, bread); see § 5-23-5 (delivery of milk)
[Excepted commodities and services may be sold or furnished only by persons who engage in the same activities on secular days]											
§ 64-1 (hunt, fish, shoot) § 25-861.2-11 (commercial shrimp trawling in designated county)	§ 64-1	§ 5-616, 5-625 to 5-638.21 (provisions of local application banning juke boxes or outside speakers on music machines; sections differ in application to towns in different counties, in activity prohibited. Some prohibit activity in vicinity of place of worship. Some prohibit Sun. & night operation.)	(Yes) (See also § 64-4-1; § 64-5 § 2, providing for permits issued by Comm'r of Labor excepting from prohibitions of § 64-4, § 64-5 industries producing goods essential to national defense under government contract in national emergencies; but no employee opposed on physical or conscientious grounds to Sun. labor may be required to work.)							§ 64-5 (restaurants & cafeterias may employ women & children)	
§ 13-1709 (shoot)	§ 13-1709		(Yes)	(Sale of drugs, medicines, surgical appliances)				[See "Restaurants, etc."]		(Sale of food to be eaten on premises)	(Sale of milk before 9:00 a.m.)
§ 39-4002 (hunt)			(Yes)								
Pen. Code, Art. 283 (hunt within ½ mile of place of worship, school, residence)	Pen. Code, Art. 285	Civ. Stat., Art. 6153 (pawnbroker Sun. & holidays)	Pen. Code, Art. 284	Pen. Code, Art. 287 (drug stores)	Pen. Code, Art. 287 (sale of newspapers)	Pen. Code, Arts. 284, 287 (vessels, R. R., wagon trains, common carriers (including delivery & receipt of goods), mail or passenger stages, persons travelling, ferry-men, toll bridges)	Pen. Code, Art. 287 (livery stables; sale of gas, motor fuel, greases)	Pen. Code, Art. 287 (ice dealers; sale of ice, ice cream)		Pen. Code, Arts. 284, 287 (hotels, boarding houses, restaurants)	Pen. Code, Art. 287 (sale of milk) [See also heading "Miscellaneous"]
§ 23-1-15 (hunting season not to open on Sun.)											

[Exceptions to § 76-55-1 omitted]

				EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
Sports	Entertainments	Operation of Man- ufacturing Pro- cesses Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecra- tion	
<p>§§ 41-6-1 to 41-6-7 (local option athletic games (with exceptions) with differing permitted hours for amateur and professional games (some professional games may be licensed only in Providence); but license may not be granted for open-air games over protest of majority of landowners within 200', or for game within 500' of place of worship); § 25-1-6</p> <p>§ 5-2-9 (local option bowling, pool, billiards after 1 p.m. not within 200' of place of worship)</p> <p>§ 5-23-2 (local option public golf courses)</p>	<p>§ 5-22-6 (Providence may license auto shows, ice skating &amp; polo, roller skating &amp; hockey in halls after 2 p.m.)</p> <p>§ 5-22-7 (local option roller skating after 2 p.m.)</p> <p>§§ 5-22-8 to § 5-22-11 (local option provisions applicable to various named towns, permitting musical entertainment, lectures, vardeville, cinema, amusement parks, miniature golf, etc.)</p> <p>Different permitted activities for different towns, and different permitted hours for different towns)</p>		<p>§ 5-23-3 (farmers co-op ass'n wholesale produce auction)</p> <p>§ 5-23-2 (local option retail sale of various classes of commodities, e.g., stationery, books, shaving &amp; dental needs, cosmetics, photo supplies, fish, vegetables, bait, etc.; rental of bathing accessories &amp; bath-houses; parking lots; boot-black &amp; hat clean'g; (except Providence); shoe-shines in Union Station, Providence)</p>	<p>§ 11-40-4 (professor of Sabbatarian or Jewish faith may labor, but not open shops for trade, load or unload vessels, work at mechanical trades in compact places (except in two named towns), etc.; provision for proof of status by certificate from pastor or adherents)</p>	<p>See § 5-23-4</p>	<p>§ 45-6-1</p>	<p>(See heading: "General Prohibitions. Permitting child or servant to work or labor")</p> <p>Dir. Lab. Mandatory Order No. 4-R-3 (1968), CCH Lab. Law Rep., State Laws (1960) p. 58,262 (retail trade; day of rest at 7 minimum wage for 7th day)</p>
<p>§ 5-103; see also § 5-110 (athletics, cinema, concerts in described counties and cities designated specifically and by classes, 2-7 p.m. &amp; 9-12 p.m.)</p>		<p>§ 64-6 (chemical plants, except certain designated textile processes; in excepted plants, fixed daily and weekly hour maxima apply)</p>	<p>§ 64-5.1 (textile plants in designated town, fixed daily and weekly hour maxima apply and Sun. work may not begin before 10 a.m.)</p>				<p>(See heading: "General Prohibitions. Permitting child or servant to work or labor")</p> <p>§ 40-52 (5-day week: textile mills)</p>
			<p>(Sale of meat &amp; fish before 9 a.m.)</p>	<p>§ 13-1716 (person keeping another day as holy time, not disturbing other persons keeping Sun. as holy time; defense to labor)</p>			<p>§ 50-709 (children)</p>
	<p>Pen. Code, Art. 287 (theater &amp; cinema in towns after 1 p.m.; local option may prohibit or regulate)</p>		<p>Pen. Code, Art. 287 (markets &amp; dealers in provisions before 9 a.m.; sales of burial materials; bathhouses; tel. tel.)</p> <p>Pen. Code, Art. 284 (necessary farm work, lounshouses; sugar mills; herders)</p>	<p>Pen. Code, Art. 284 (person conscientiously observi. g another day; defense to Art. 283)</p>			<p>§ 34-5-2 (children)</p> <p>Indust. Comm'n Mandatory Orders Nos. 1 to 4, supplemented by Order No. 5 (1960), CCH Lab. Law Rep., State Laws (1960) pp. 58,929 to 58,935 (women &amp; children in specified occupa.)</p>



STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR				
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting, Shooting and Fishing
VERMONT	Vt. Stat. Ann. (Rev. 1959)	T. 13, § 3301 ("secular business or employment")				T. 13, § 3301 (dance; play, game, sport or entertainment disturbing peace or for compensation)	T. 7, § 62 (with exceptions)				
VIRGINIA	Va. Code (1950) (Replacement Vols. 1953 & 1960)	§ 18-1-358	§ 18-1-358 (expressly negates "necessity" exemption for sale of listed categories of merchandise, e.g., jewelry, silverware, musical instruments, toys, clothing & wearing apparel, home, business, or outdoor furniture, furnishings or appliances, sporting goods (except sale or rent of bathing, boating, fishing paraphernalia & sale or rent on premises of equipment essential to sports, athletic events, recreational facilities), pets, farm produce (except produce grown by seller sold at roadside or where grown), fresh (except smoked or cured ham); list is not exclusive)	§ 18-1-358		§ 18-1-360 (running, loading, unloading R.R. trains, with exceptions, e.g., mail, passenger, nonstop interstate trains & trains carrying perishables) § 18-1-363 (loading, unloading steamships, with similar exceptions)	§ 4-19 (State stores) § 4-97 (local option)	§ 18-1-358 (negates "necessity" exemption for sale of motor vehicles, trailers (except mobile homes))			§ 29-143(a) (in § 29-195 (take oysters, clams for commercial purposes, Sur. & § 28-234 (net Potomac) § 29-150 (Va. 1950, c. 439) (private property out owner's possession in described county)
WASHINGTON	Wash. Rev. Code (1959)	§ 9-76-010 (labor about any trade or manufacture)	§ 9-76-010 (expressly negates "necessity" exemption for sale of uncooked meat, groceries, clothing, footwear)	§ 9-76-010	§ 9-76-010 (promoting any noisy sport or amusement disturbing the peace of the day)		§ 9-76-010 (keeping open saloon)		§ 9-76-010 (expressly negates "necessity" exemption)	§ 6-08-070 (& specified holds)	
WEST VIRGINIA	W. Va. Code Ann. (1955) & Cum. Supp. (1960)	C. 61, art. 4, § 17 (1967)		C. 61, art. 8, § 17 (1967)			C. 60, art. 3, § 12 (1907(40)) (State stores)			C. 29, art. 5A, § 6 (2833(6))	C. 61, art. 8, (shoot, carry C. 20, art. 3, (hunt, but previously submitted)
WISCONSIN	West's Wis. Stat. Ann. (1957-1958)						§ 176.06 (permitted hours)	§ 218.01(3)(a) 21 (license revocation)		§ 169.11	
WYOMING	Wyo. Stat. (1957)						§ 12-19	§ 33-112			

## PROHIBITIONS

### EXCEPTIONS TO GENERAL PROHIBITIONS

[illegible]

				EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOREEMPLOYEES
Sports	Entertainments	Operation of Man- ufacturing Pro- cesses Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecra- tion	
T. 13, § 3301 (winter sports, golf, tennis) T. 40, § 307 (local option motor races after 2 p.m.) T. 13, § 3302 (local option enumerated competition sports, cinema, lectures, concerts after 2 p.m.)							T. 21, § 434 (children)
(Sports & athletic events)	(Cinema, scenic, historic, recreational, amusement facilities)	(See "Miscellaneous")	(Operation of furnaces, kilns, plants, wholesale food warehouses, ship chandlers, other business of kind neces- sary to conduct Sun.)	§ 18-359 (person con- scientiously observing Sat., not compelling any servant not of his faith to labor on Sun.)			§ 40-97 (children)
				§ 9-76-020 (person keep- ing another day as holy time, not disturbing other persons keeping Sun. as Sabbath; de- fense to labor)			Indust. Welfare Comm. Orders Nos. 49 (1950 & 53-1951), CCH Lab. Law Rep., State Laws (1960) pp. 59,356, 59,365 (children in specific occupa.)
		C. 61, art. 8, § 18 (6073) (employees must be on rotating schedule on Sabbath)	C. 61, art. 8, § 18 (9078) (gro- cers or sellers primarily of food, not within 300 ft. of place of worship during hours of worship)	C. 61, art. 8, § 18 (6073) (person conscientiously observing Sat., not dis- turb other persons in sun. observance, and not compelling any servant not of his faith to labor on Sun.)			C. 21, art. 6, § 17 (2961) (children)
				§ 218-01 (3)(a) 21 (per- son conscientiously ob- serving Sat., Jewish Sabbath)			§ 103-68 (1) (children) § 103-85 (factory or mercantile establishments, with exceptions; inapplicable to employees whose only Sun. labor is tending animals or tending fires)
					§ 15-160, Twelfth	§ 15-160, Eleventh	§ 27-22s (children)